133-610

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.8

No. ~~219.~~ 19 **3**

HENRIETTA C. KELLER, APPELLANT,

vs.

ISABELLA W. ASHFORD, EXECUTRIX OF FRANCIS A. ASHFORD, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 10, 1885.

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1 *Bill of Complaint.* (*Filed May* 13, 1878.)

In the Supreme Court of the District of Columbia, in Equity, the 13th day of May, A. D. 1878.

Henrietta C. Keller, of the city of Washington, District of Columbia, brings this her bill of complaint against Francis A. Ashford, of said city and District.

And thereupon your oratrix shows:

1. That on the 17th day of August, A. D. 1875, one Archie Thompson, being seized in fee of lot numbered five (5), in Kelly's recorded sub-division of part of square eight hundred and eighty-nine (889), by his certain deed of trust of that date, conveyed the said lot of ground, together with its improvements, to one Martin M. Rohrer, in trust to secure his certain note for $1,500, payable in three years after the date thereof, to the order of Abner B. Kelly, with the interest at the rate of 10 per cent. per annum until paid, and your oratrix files herewith a certified copy of said deed of trust, marked "H. C. K. Exhibit No. 1," and prays that the same may be taken as part hereof.

2. That on the 21st day of February, A. D. 1876, the said Thompson and wife conveyed the same lot above described to one William A. Gordon, in trust to secure his certain note for $2,000, payable in one year after the date thereof, with interest at the rate of 8 per cent. per annum until paid, to the order of Moses Kelly, who endorsed the same to your oratrix, who is the present owner and holder of said note, and your oratrix files herewith a certified copy of said deed of trust, and also a copy of the note thereby secured and now owned as aforesaid by your oratrix, marked

2 respectively "H. C. K. Exhibit No. 2," and "H. C. K. Exhibit No. 3," and prays the same may be considered as part hereof.

3. And your oratrix further shows that afterwards, to wit, on the 1st day of January, A. D. 1877, the said Archie Thompson and wife, by their certain deed in fee, conveyed the said hereinbefore described lot of ground with its improvements (together with other lots in the same square) to Francis A. Ashford, the defendant to this bill, subject however to certain encumbrances resting thereon, to wit, the two encumbrances hereinbefore set forth in paragraphs one and two of this bill, payment of both of which said defendant Ashford assumed, and for that purpose withheld and reserved from the consideration by him paid for said property so much thereof as was then an equivalent of, or was then necessary to cancel and settle the said encumbrances, and your oratrix files herewith a certified copy of said deed in fee, marked "H. C. K. Exhibit No. 4," and prays that the same may be taken as part hereof.

4. And your oratrix further alleges and charges that said defendant Ashford accepted said deed in fee with its provisions imposing upon him the personal obligation aforesaid to pay said encumbrances, and by virtue thereof entered into possession of the property

in said deed mentioned, and not only collected the rents and profits arising therefrom from the date of said deed until the sale made under the provisions of the trust hereinbefore set forth in paragraph one of this bill, and hereinafter mentioned, but also paid interest on said first mortgage to the holder thereof and likewise paid the taxes charged against the same.

5. And your oratrix further alleges that through her agent demand was made on said Ashford for the payment of the note hereinbefore mentioned, and secured as aforesaid and by her held,
3 and that said defendant, whilst he did not deny his liability to pay the same, yet neglected so to do, and now refuses to pay the same.

6. Your oratrix further alleges that in pursuance of the provisions of the trust, described in paragraph one of this bill, the trustee therein named, after previous advertizement, on the 14th day of March last, exposed to public sale said lot five (5) in said square 889, and on the same day sold the same to John C. Harkness, trustee, at and for the sum of $1,700, a sum which was insufficient to satisfy and liquidate the debt secured by said trust, by reason whereof, the lien aforesaid of your oratrix for the amount of said note for $2,000, and interest thereon has become wholly extinct, a deed having passed from said trustee to the purchaser at said sale.

Wherefore your oratrix being advised that the acceptance by said Ashford of the said deed in fee, imposing upon him and charging him personally with the payment of the encumbrances resting thereon at the time of his said purchase, and the further fact that he withheld from the purchase-money or consideration paid for said property, so much thereof as was then necessary to settle and liquidate the said encumbrances, or was, in the negotiation involved in said transfer in fee, in any manner credited with an amount equivalent to the said encumbrances by him assumed, was an appropriation by him of said part of said purchase-money or of the amount so credited as aforesaid, to the use of your oratrix and constituted a fund by him held in trust for her benefit which this court will enforce in her behalf.

Therefore prays:

1. That the writ of subpœna may issue, commanding, &c. The answer of the defendant under oath is hereby waived.
4 2. That a decree of this court may be made in favor of your oratrix and against said Ashford for the amount of the note by her held and secured by the trust mentioned in paragraph two of this bill, assumed as aforesaid by said Ashford, together with the interest thereon according to its tenor, besides costs.

3. And for such other and further relief as the exigency of the case may require, and as in duty, &c.

HENRIETTA C. KELLER.

W. D. DAVIDGE,
WM. W. BOARMAN,
For Counsel.

I do solemnly swear that I have read the bill of complaint by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe the same to be true.

HENRIETTA C. KELLER.

Subscribed and sworn to before me this 13th day of May, A. D. 1878.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

Exhibits to Bill.

H. C. K. EXHIBIT No. 1.

ARCHIE THOMPSON to MARTIN M. ROHRER. } Trust. Recorded Aug. 21, 1875, 10:30 A. M.

This indenture, made this seventeenth day of August, in the year of our Lord one thousand eight hundred and seventy-five, between Archie Thompson and —— Thompson, his wife, of Washington city, in the District of Columbia, of the first part, and Martin M. Rohrer, of the same place, trustee, of the second part.

5 Whereas said Archie Thompson is justly indebted unto Abner B. Kelly in the sum of fifteen hundred dollars ($1,500), and hath given his note for that amount, of even date herewith, payable three (3) years after date with interest at the rate of ten (10) per cent. per annum, to be paid quarterly until paid; and in order to secure the full and punctual payment of said note, with interest thereon, when and as the same shall become due and payable, said parties of the first part do execute these presents:

Now, therefore, this indenture witnesseth: That the said parties of first part, for and in consideration of the premises, and, further, the sum of one dollar, in lawful money of the United States, to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do, by these presents, grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part all that certain piece or parcel of ground lying, being, and situate in said city of Washington, known and described as lot numbered five (5), in Abner B. Kelly's recorded subdivision of square numbered eight hundred and eighty-nine (889), said parties of the first part hereby agreeing at their own cost, so long as any portion of said note or any interest thereon shall remain unpaid, to keep the premises insured in the name and to the satisfaction of said party of the second part, who shall, in case of loss, apply whatever may be received therefrom towards discharge of said indebtedness, and turn over remainder, if any, to said parties of the first part,

together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to or out of the said piece or parcel of land and premises.

To have and to hold the said piece or parcel of land and premises, with the appurtenances, unto and to the use of the said parties of the first part, their heirs or assigns, to use and occupy the said described premises, and the rents, issues, and profits thereof; to take, have, and apply to and for their sole use and benefit, until default be made in the payment of said note, or any part thereof,
6 any interest, taxes, insurance, or any proper cost, charge, commission, half commission, or expense in and about the same.

And upon the full payment of all of said note and the interest thereon, and all other proper costs, charges, commissions, half commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said parties of the first part, their heirs and assigns, at their cost.

And upon this further trust, that upon default being made in the payment of the said note, any part thereof at maturity, any interest, taxes, insurance, or any proper cost, charge, commission, half commission, or expense in and about the same, then and at any time thereafter, to sell the said piece or parcel of land and premises at public auction upon such terms and conditions and at such time, place, and after such previous public advertisement as the said party of the second part, or the trustees acting in the execution of this trust, shall deem advantageous and proper, and to convey the same in fee-simple to the purchaser or purchasers thereof at his, her, or their cost and expense and without any liability to see to the application of the purchase-money, and of the proceeds of said sale or sales first to pay all proper costs, charges, and expenses and to retain as compensation a commission of five per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon to the time of such sale, whether the shall be *one* or not; and lastly, to pay the remainder, if any, to said parties of the first part, their heirs or assigns.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ARCHIE THOMPSON. [L. S.]
LAURA V. THOMPSON. [L. S.]

Signed, sealed, and delivered in the presence of—

JOHN W. FRAZEE.
GEORGE W. BAGG.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

7 I, George W. Bagg, a notary public in and for the District and county aforesaid, do hereby certify that Archie Thompson and Laura V. Thompson, his wife, parties to a certain deed bearing date on the seventeenth day of August, A. D. 1875, and hereto annexed, personally appeared before me, in the county aforesaid, the said Archie Thompson and Laura V. Thompson, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Laura V. Thompson, the wife of the said Archie Thompson, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same and that she wished not to retract it.

Given under my hand and notarial seal this 21st day of August, A. D. 1875.

[NOTARIAL SEAL.] GEORGE W. BAGG,
Notary Public.

H. C. K. EXHIBIT No. 2.

ARCHIE THOMPSON *et ux.* to WM. A. GORDON. } Trust. Recorded March 11th, 1876.

This indenture made the twenty-first day of February, in the year of our Lord one thousand eight hundred and seventy-six, between Archie Thompson and Laura V. Thompson, Washington city, in the District of Columbia, of the first part, and William A. Gordon, of the same place, of the second part. Whereas the said Archie Thompson is justly indebted unto Moses Kelly in the sum of two thousand dollars ($2,000) and hath given him his note therefor of even date herewith payable in one year after date, with interest at the rate of eight per cent. per annum until paid, and said parties of the first part being desirous to secure the punctual payment of said note when and as the same shall become due and payable, with all interest and costs due and accruing thereon, they therefore execute these presents.

Now, therefore, this indenture witnesseth: That the said
8 parties of the first part for and in consideration of the premises aforesaid, and further the sum of one dollar, in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns, the following described real estate, situated in the city of Washington, District of Columbia, to wit: lot numbered five (5) in Kelly's recorded sub-

division of square numbered eight hundred and eighty-nine (889), together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging or in anywise appertaining, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part, of, in, to, or out of the said piece or parcel of land and premises.

To have and to hold the said piece or parcel of land and premises with the appurtenances unto and to the use of the said party of the second part, his heirs and assigns.

In and upon the trusts nevertheless hereinafter mentioned and declared, and none other, that is to say, in trust to permit the said Archie Thompson, his heirs, or assigns to use and occupy the said described premises, and the rents, issues, and profits thereof, to take, have, and apply to and for his and their sole use and benefit until default be made in the pavement of said note or any instalment of interest due thereon, or any proper cost, charge, commission, half-commission or expense in and about the same. And upon the full payment of all of said note and interest thereon, and all other proper costs, charges, commissions, half-commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Archie Thompson, his heirs, or assigns at his or their cost.

And upon this further trust, that upon default being made in the payment of the said promissory note or any instalment of interest due thereon, or any proper cost, charge, commission, half-commission, or expense in and about the same, then and at any time thereafter to sell the said piece or parcel of land and premises at public auction in front of the premises after at least ten days' notice of the
9 time, place, and terms of sale by advertisement in some one or more of the newspapers printed and published in the said city of Washington, which said terms of sale shall be as follows, viz: the amount of indebtedness secured by this deed of trust unpaid, with the expenses of sale, in cash, and the balance at twelve months, for which the notes of the purchaser, bearing interest from the day of sale and secured by a deed of trust on the property sold, shall be taken; a deposit of one hundred dollars shall be required of the purchaser at the time of sale, and all conveyancing and revenue stamps shall be at the expense of the purchaser.

And upon this further trust, upon full compliance with the terms of sale to convey the property sold in fee-simple to the purchaser or purchasers thereof at his, her, or their cost and expense, and without any liability to see to the application of the purchase money, and out of the proceeds of said sale or sales, first to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said Archie Thompson, his heirs or assigns.

And the said parties of the first part do hereby covenant with

the said party of the second part, his heirs and assigns, that all taxes upon the said land shall be duly paid, and that the building on said parcel of land shall be kept insured during the continuance of this trust in some good and responsible fire insurance company or companies to the satisfaction of said party of the second part in the sum of one thousand dollars, for the benefit of the debt hereinbefore described, and the policy or policies of insurance be assigned to the said party of the second part as trustee and in these presents. And further, that in case the said Archie Thompson, his heirs or assigns, shall fail to pay taxes or to keep said property, &c., insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned, and the amount of taxes and premium paid shall be considered a part of the expense of said note secured hereby, in default of payment of which the said party of the second part shall have power to sell said property hereby conveyed as aforesaid, and shall dispose of the proceeds of sale as hereinbefore provided.

And it is further agreed, that if the property shall be advertised for sale under the provisions of the deed and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ARCHIE THOMPSON. [L. S.]
LAURA V. THOMPSON. [L. S.]

Signed, sealed, and delivered in the presence of—
A. B. KELLY.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, A. B. Kelly, a notary public in and for the county aforesaid, do hereby certify that Archie Thompson and Laura V. Thompson, his wife, parties to a certain deed bearing date on the 21st day of February, A. D. 1876, and hereto annexed, personally appeared before me, in the county aforesaid, the said Archie Thompson and Laura V. Thompson, his wife, being personally well known to me to be the persons who executed the said deed and acknowledged the same to be their act and deed; and the said Laura V. Thompson being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and seal, this 24th day of February, A. D. 1876.

[NOTARIAL SEAL.]

A. B. KELLY,
Notary Public.

11 H. C. K. EXHIBIT No. 3.

Secured by deed of trust. Lot 5, Sq. 889.

$2,000. WASHINGTON, D. C., 21 *Feb., A. D.* 1876.

One year after date I promise to pay to the order of Moses Kelly the sum of two thousand dollars, with interest at eight per cent. per annum until paid, for value received. Payable at the National Metropolitan Bank.

ARCHIE THOMPSON.

No.

——— ———, *Pres't.*

(Indorsed: Archie Thompson. $2, 000, int. 161.33, 21 Feb. '77. Nat. Met. Moses Kelly. Henrietta C. Keller, by M. K.)

H. C. K. EXHIBIT No. 4.

ARCHIE THOMPSON to FRANCIS A. ASHFORD. } Recorded Jan. 22, 1877, 12 a. m.

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and seventy-seven, between Archie Thompson and Laura V. Thompson, his wife, of Washington city, in the District of Columbia, of the first part, and Francis A. Ashford, of the same place, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of forty-five hundred dollars in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns forever, all those certain pieces or parcels of ground lying and being and situate in said city of Washington, *and* known and described as lots numbered five (5), seven (7), eight (8), and nine (9), in Kelly's *recorded* subdivision of square numbered (889) eight hundred and eighty-nine, subject, however, to certain encumbrances now resting thereon,

12 payment of which is assumed by said party of the second part, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertying, and all the remainders, reversions, rents, issues and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to, or out of the said pieces or parcels of land and premises.

To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit and behoof forever.

And the said parties of the first part, for themselves and for their

heirs, executors, administrators, do hereby covenant, promise, and agree, to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part and their heirs, shall and will warrant and forever defend the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through them, or either of them.

And further, that the said parties of the first part and their heirs shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make and execute all other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or their counsel learned in the law shall advise, devise, or require.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

ARCHIE THOMPSON. [L. S.]
LAURA V. THOMPSON. [L. S.]

Signed, sealed, and delivered in the presence of—
SAM'L C. MILLS.

13 DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, Samuel C. Mills, a notary public in and for the county and District aforesaid, do hereby certify that Archie Thompson and Laura V. Thompson, his wife, parties to a certain deed bearing date on the first day of January, A. D. 1877, and hereto annexed, personally appeared before me in the county aforesaid, the said Archie Thompson and Laura V. Thompson, being personally well known to me to be the persons who executed said deed, and acknowledged the same to be their act and deed; and the said Laura V. Thompson being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this 12th day of January, A. D. 1877.

[NOTARIAL SEAL.] SAM'L C. MILLS,
Notary Public.

Subpœna to Answer.

In the Supreme Court of the District of Columbia. May 13, 1878.

HENRIETTA C. KELLER, Complainant,
against
FRANCIS A. ASHFORD, Defendant,
} No. 6243. Equity Docket 18.

The President of the United States to Francis A. Ashford:

You are hereby commanded to appear in this court, at its
14 first special term, occuring twenty days after service of this subpœna and answer the exigency of the original bill under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. Carter, chief justice.

R. J. MEIGS, *Clerk, &c.*

MEMORANDUM.—That the defendant herewith served is to enter — appearance in this suit in the clerk's office, on or before the day at which this writ is returnable; otherwise, the bill may be taken for confessed.

Return of Marshal.

Snmmoned F. A. Ashford, May 13, 1878.

F. DOUGLASS, *Marshal.*

Answer of Francis A. Ashford. Filed July 2, 1878.

In the Supreme Court of the District of Columbia. In Equity.

HENRIETTA C. KELLER, Plaintiff,
vs.
FRANCIS A. ASHFORD, Defendant.
} No. 6243.

The answer of the above-named defendant to the bill filed in this cause.

The defendant, saving and reserving unto himself all and all manner of benefit or advantage of exception or otherwise
15 that can or may be had or taken to the said bill, and denying all matters therein alleged which are not hereinafter specifically admitted, for answer to the several paragraphs of said bill, says and alleges:

1st. That the defendant admits the matters alleged with reference to the deed of trust mentioned in this paragraph, but has no personal knowledge of the nature of the title of which said Thompson was seized in said property.

2d. That the defendant has no personal knowledge of the matters stated in the second (2d) paragraph of said bill, and as to all the matters therein stated, which do not appear from the record of said deed of trust, this defendant requires strict proof, if such proof be material to the plaintiff's case and proper to be made.

3d. The defendant admits that a paper purporting to be a deed bearing date January 1st, 1877, wherein Archie Thompson and his wife are parties of the first part and this defendant is named as party of the second part, was recorded among the land records of the District of Columbia, which paper purported to convey to this defendant lots (5, 7, 8 & 9) five, seven, eight, and nine of square (889) in fee-simple, subject, as stated in said paper purporting to be a deed, to certain incumbrances resting thereon; but this defendant denies that the two deeds of trust mentioned in the 1st and 2d paragraphs of said bill are in any way specifically referred to in said alleged deed, or in any way designated or identified by any earmarks or is the number of encumbrances on the several lots stated in said alleged deed, as might be implied is the case from the statements in said 3d paragraph, and defendant refers to said alleged deed for its terms, language, and purport.

This defendant explicitly denies that he ever assumed the payment of said two encumbrances mentioned in the 1st and 2d paragraphs of said bill, or that he for that purpose withheld and reserved from the consideration alleged in said bill to have been paid for said property so much thereof as was then an equivalent of, or was then necessary to cancel and settle the said encumbrances.

16 4th. The defendant denies that he accepted said alleged deed in fee with its provisions imposing upon him the personal obligations aforesaid, to pay said encumbrances, or that he ever has accepted said alleged deed in any way, and denies that by virtue of said alleged deed he entered into possession of said property unless the matters hereinafter stated be taken as matter of law, to be an acceptance of said alleged deed, and defendant is advised that they are not to be so taken. He admits that he collected the rents of said property, but under the circumstances hereinafter stated and not otherwise; and he also admits that he paid interest on said first encumbrance, and taxes on said property, but said payments were made under the circumstances hereinafter stated with reference thereto, and not in consequence of an acceptance of said deed with an agreement to pay either of the encumbrances mentioned in said bill.

5th. The defendant admits that demand was made by the plaintiff's solicitor in this suit, Mr. Boarman, upon defendant for payment of said note, but said demand was made many months after the said alleged deed in fee was made, to wit, some time in the month of February, 1878.

The defendant states that he did deny his liability for the payment of said note, and says that he informed said solicitor that he did not intend to pay said note, and did not intend to keep said property. And the defendant never in any way admitted, and does not now admit, any liability on his part to plaintiff, nor did said Boarman, in his earlier interviews with this defendant, insist or even suggest that the defendant was personally liable to the plaintiff on the encumbrance alleged to be held by him.

6. The defendant admits the sale and conveyance to have been made as stated in the 6th paragraph of said bill, and submits to the court

for its decision what effect said sale had upon the alleged lien
17 of the plaintiff on said property; but he is advised by counsel, and submits to the court that, if any liability on defendant's part to pay the said encumbrance alleged to be held by the plaintiff was created by reason of the other matters alleged in said bill (which defendant denies) the said sale and conveyance to Harkness, *ipso facto* terminated said liabillty and released defendant from any personal responsibility with respect to said note held by plaintiff, and the plaintiff ought not therefore to have or maintain this suit, and he asks the same benefit of this his objection as if the same had been taken specially or otherwise.

And this defendant, having answered specifically the allegations of said bill, further answering as to the matters therein referred to, says that the truth is as follows:

That in the month of February, 1877, and a month or more after the said deed had been recorded, Moses Kelly, mentioned in said bill, stated to this defendant that he, Kelly, had had deeded to this defendant lots on H street between Seventh and Eighth (7th and 8th), Northeast.

That although there was then an encumbrance on said houses, he (said Kelly) thought the equity in said houses was worth something, and that he thought he would sell them in such a way as to pay defendant some part of his (said Kelly's) indebtedness to defendant, and told the defendant that he might collect the rents and apply them to the payment of the said indebtedness to defendant, but that it would be necessary for defendant to pay the interest due to Mr. Harkness on the note held by him which was secured on said property, as he Harkness, was pushing for it.

This defendant accordingly paid to said Harkness $150 for interest then due, and in August, 1877, paid said Harkness the further
sum of $75 for interest on said note. The defendant, in the
18 meantime, also paid some taxes on said property, which were in arrear, this defendant not knowing until after the said first payments were made that any other encumbrance was on the property. Said Kelly was at the time he told the defendant said houses had been conveyed to defendant, and from thenceforth has been and still is justly and bona fide indebted to defendant for money advanced and loaned to him, in a sum far exceeding the value of said four houses and lots; and defendant, being willing to receive payment of said indebtedness, so far as he could, by collecting the rents from said property and applying the same to the said debt due from Kelly to himself, collected said rents, or so much of them as he was able to collect from February, 1877, to the said sale to Harkness; but this defendant had no understanding or agreement with said Kelly, or with any one, that he would assume or would pay the said encumbrance of $1,500 on said property, or any other encumbrance thereon. And of the existence of the deed of trust to Gordon or the note secured thereby, the defendant had no knowledge, notice or intimation until eight (8) or ten (10) months after he was informed that the property had been conveyed to him,

That he has never seen, read, or heard read, the said alleged deed to

him, or a copy thereof, nor was he ever aware that said alleged deed contained any clause or provision making him, in express terms or otherwise, assume the encumbrances therein, or requiring him to pay the same, until a short time since, when notified that such was the fact.

The only knowledge the defendant had of there being a deed to him or of the terms thereof, until long after the same had been recorded, was what he learned from said Kelly, as aforesaid.

That defendant did not and does not know Archie Thompson or his wife, and never had any business relations with them or
19 either of them, of any kind. That no consideration moved from him to said Thompson or wife for said deed. That if any agreement was made by said Kelly with said Thompson whereby said property should be conveyed to this defendant, and that this defendant should assume and pay said encumbrances, which defendant denies, such agreement was unknown to and unauthorized by this defendant, and this defendant avers that it was not the intention of the said Thompson who executed said deed or of the said Kelly at whose instance it was prepared, executed, and recorded that this defendant should be made to pay said encumbrances; and the defendant is informed, and so avers, that the said Thompson has hitherto and still refuses to hold this defendant responsible for the payment of plaintiff's claim, or to bring action or suit against this defendant. The said Thompson, well knowing that the intention was to convey to defendant only the equity in said property without in any way making him personally liable for the debts secured on said property, and such defendant avers the fact to be, and he so understood the effect and purpose of the conveyance of said houses when he assumed to collect rents thereof.

When payment of the note alleged to be held by plaintiff was demanded of him, which was prior to the sale to Harkness, defendant refused to pay the same, informing the plaintiff's said solicitor that he knew nothing of the encumbrance represented by said solicitor until long after said deed from Thompson and wife to defendant was recorded, and that he did not intend to hold the said property with the encumbrances thereon, and offered to convey all his interest therein to plaintiff without any consideration being paid by her therefor; which offer (as defendant has been informed) the plaintiff was willing to accept, but was prevented therefrom by said solicitor, although the interest and taxes, as aforesaid, paid by this defendant exceeded the rents collected by him, and he had derived no benefit or profit whatever from said conveyance.

20 That plaintiff (as defendant is informed) or her said solicitor attended said sale, or knew that the same was to take place, and knowing, also, that defendant had refused to pay said note, and had informed said solicitor that he (defendant) did not intend to keep said house, said plaintiff neglected to take any means to protect herself against loss by reason of a sacrifice of said house and lot, and allowed the same to be sold at a great sacrifice, the same not bringing more than one-half its value—and this, although the plaintiff's said solicitor admitted that she had funds with which

she could have taken up said debt held by Harkness. And the defendant is informed, and so avers, that plaintiff became the holder of said note long before (if at all) said pretended deed to defendant was made.

Further answering, defendant says that before this suit was begun, the plaintiff herein sued at law said Archie Thompson and Moses Kelly, maker and endorser of said note alleged to be held by her, and recovered judgment thereon against said Thompson and Kelly on the lower side of this court; on which judgment execution has been issued, which judgment and execution is (the defendant is advised) a bar to this suit, and he asks the same benefit of this his objection as if the same had been taken specially by plea or otherwise.

And further the defendant says that the plaintiff has not in and by her said bill stated such a case as doth or ought to entitle her to any such relief as is thereby sought and prayed for from or against the defendant. And further, that if the matter stated do give the the plaintiff any cause or complaint against the defendant, the same is triable and determinable at law, and ought not to be inquired of by this court. Wherefore, he asks the same benefit from the objections now here and hereinbefore made as though he had
21 specially demurred to the bill of complaint, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) FRANCIS A. ASHFORD.

APPLEBY & EDMONSTON,
Solicitors for Defendant.

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true; and that the facts therein stated, upon information and belief, I believe to be true.

FRANCIS A. ASHFORD.

Subscribed and sworn to before me this 2d day of July, 1878.

R. J. MEIGS, *Clerk.*
By M. A. CLANCY, *Asst. Clerk.*

Replication. (*Filed July* 30, 1878.)

In the Supreme Court of the District of Columbia, the 30th of July, A. D. 1878.

HENRIETTA C. KELLER
vs.
FRANCIS A. ASHFORD, } Eq., No. 6243. Doc. 18.

The plaintiff hereby joins issue with the defendant.

W. D. DAVIDGE,
WM. W. BOARMAN,
Sol'rs for Pl'ff.

22 In the Supreme Court of the District of Columbia.

Filed March 9, 1881. R. J. Meigs, Clerk.

HENRIETTA C. KELLER
vs.
FRANCIS A. ASHFORD. } In Equity. No. 6243. Docket 18.

Depositions in Chief for the Complainant.

Met pursuant to notice at 10.20 a'clock a.m. on Friday, December 16th, 1881.

Present: Mr. R. B. Washington and Mr. W. W. Boardman, for the complainant; Mr. W. E. Edmonston, for the respondent.

Whereupon HENRIETTA C. KELLER, a witness produced and sworn on behalf of the complainant, deposes and says as follows:

I am the complainant in this cause, and my name is Henrietta C. Keller. I am the owner of the note now exhibited to me. (Counsel for complainant here files copy of said note marked Exhibit No. 1, J. B. T.) [Mr. Edmonston, while he admits that the copy filed is a copy of the note shown the witness, objects to the filing of a copy of the note until the original thereof shall have been proved.] Neither the principal or any interest on said note has been paid to me. I owned certain securities of the District of Columbia, amounting to something like $2,000; Mr. Kelly sold them for me. I mean Mr. Moses Kelly. He told me that he would invest the proceeds for me. He did not say in what the investment should be made. He told me to call again in a few days, which I did. Then he had an account book made out with the amount of the note—

23 $2,000—with the name of Archie Thompson. He told me that the note was in the National Metropolitan Bank, and that I would draw the interest there. I think that I gave Mr. Kelly my check for an amount sufficient to make up the difference between the proceeds of the sale of the certificates and the amount of the $2,000 note. The fact is that I paid $2,000 for the note in cash in the way I have explained.

Q. When you purchased the note in question from Mr. Kelly, did he tell you whether it was secured?

A. He did. He told me it was well secured.

Q. Did he tell you at the time whose note it was?

A. No; but he gave me a little book containing the name of the maker of the note—that is, Archie Thompson and the amount.

Q. What kind of a book was this?

A. It was a small memorandum book.

Q. Was it the same kind of book which a bank gives to a depositor?

A. It was.

Q. Can you state about what time you purchased the note in question?

A. February, 1876.

Q. From whom did you buy it?

A. I suppose that I bought it from Moses Kelly.

she could have taken up said debt held by Harkness. And the defendant is informed, and so avers, that plaintiff became the holder of said note long before (if at all) said pretended deed to defendant was made.

Further answering, defendant says that before this suit was begun, the plaintiff herein sued at law said Archie Thompson and Moses Kelly, maker and endorser of said note alleged to be held by her, and recovered judgment thereon against said Thompson and Kelly on the lower side of this court; on which judgment execution has been issued, which judgment and execution is (the defendant is advised) a bar to this suit, and he asks the same benefit of this his objection as if the same had been taken specially by plea or otherwise.

And further the defendant says that the plaintiff has not in and by her said bill stated such a case as doth or ought to entitle her to any such relief as is thereby sought and prayed for from or against the defendant. And further, that if the matter stated do give the the plaintiff any cause or complaint against the defendant, the same is triable and determinable at law, and ought not to be inquired of by this court. Wherefore, he asks the same benefit from the objections now here and hereinbefore made as though he had
21 specially demurred to the bill of complaint, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) FRANCIS A. ASHFORD.

APPLEBY & EDMONSTON,
Solicitors for Defendant.

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true; and that the facts therein stated, upon information and belief, I believe to be true.

FRANCIS A. ASHFORD.

Subscribed and sworn to before me this 2d day of July, 1878.

R. J. MEIGS, *Clerk.*
By M. A. CLANCY, *Asst. Clerk.*

Replication. (*Filed July* 30, 1878.)

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Whereupon HENRIETTA C. KELLER, a witness produced and sworn on behalf of the complainant, deposes and says as follows:

I am the complainant in this cause, and my name is Henrietta C. Keller. I am the owner of the note now exhibited to me. (Counsel for complainant here files copy of said note marked Exhibit No. 1, J. B. T.) [Mr. Edmonston, while he admits that the copy filed is a copy of the note shown the witness, objects to the filing of a copy of the note until the original thereof shall have been proved.] Neither the principal or any interest on said note has been paid to me. I owned certain securities of the District of Columbia, amounting to something like $2,000; Mr. Kelly sold them for me. I mean Mr. Moses Kelly. He told me that he would invest the proceeds for me. He did not say in what the investment should be made. He told me to call again in a few days, which I did. Then he had an account book made out with the amount of the note—

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Q. When you purchased the note in question from Mr. Kelly, did he tell you whether it was secured?

A. He did. He told me it was well secured.

Q. Did he tell you at the time whose note it was?

A. No; but he gave me a little book containing the name of the maker of the note—that is, Archie Thompson and the amount.

Q. What kind of a book was this?

A. It was a small memorandum book.

Q. Was it the same kind of book which a bank gives to a depositor?

A. It was.

Q. Can you state about what time you purchased the note in question?

A. February, 1876.

Q. From whom did you buy it?

A. I suppose that I bought it from Moses Kelly.

Q. Was he an officer of the National Metropolitan Bank at that time?

A. He was not.

Q. What became of the note after you purchased it?

A. It was deposited in the National Metropolitan Bank for collection.

Q. And the book, about which you have testified, showed that deposit?

A. Yes.

Q. Did you make any inquiries, if so, from whom, about the note during the time it remained on deposit in the bank?

A. I did; to Mr. Moses Kelly.

Q. What was the result of those inquires?

A. I asked him two or three times. His answer once was, "You need not be uneasy; it is well secured." At another time he told me that he had turned over the property, on which the note was secured, to Dr. Ashford. I asked him if I should hold Dr. Ashford responsible.

(Mr. Edmonston objects to the testimony as to Mr. Kelly's declarations as to the responsibility of Dr. Ashford.)

The witness continues: Mr. Kelly said yes.

(Mr. Edmonston objects to the answer.)

Q. When did you take the note, which you had pur-
24 chashed from Mr. Kelly, out of the National Metropolitan Bank?

A. When I gave it to Mr. Boarman.

Q. Will you look at the note now shown, marked "H. C. K. No. 1," and tell me whether that is the note surrendered to you by the bank?

(The complainant's counsel here offers in evidence the note in question, to which offer the defendant's counsel objects, until proper proof of the note is made.)

A. Yes; it is.

Q. Were the endorsements on the back of the note there at the time you took the note from the bank?

A. Yes.

Q. Did Mr. Kelly tell you that Dr. Ashford would be responsible for the payment of the note before or after you took the note from the bank?

(Objected to by counsel for defendant.)

A. He told me so before I took the note from the bank.

Q. Can you form any idea what time elapsed from the payment of the purchase money to the surrender of the note to you by the bank?

A. I cannot form any idea of the exact time, but I know it was after the note became due.

Q. What is the relation between Moses Kelly and Dr. Ashford?

A. Dr. Ashford is the son-in-law of Mr. Kelly.

Q. Was he his son-in-law at the time he informed you he had turned over to him the property upon which the note was secured?

A. He was.

Q. You have stated that Mr. Kelly gave you a book at the time you paid the money for the note; was not this simply an ordinary bank book, showing that the note described was deposited in the bank to your credit?

A. It was.

(Mr. Edmonston here asks the production of the book before the close of the testimony for the complainant.)

Q. After you withdrew the note from the bank, did you place it in the hands of any one for collection; if so, in whose hands?

A. I placed it in the hands of Mr. W. W. Boarman, an attorney-at-law, for collection.

Cross-examination by Mr. EDMONSTON:

Q. Did you keep a bank account at the National Metropolitan Bank at the time the note was deposited?

A. I did.

Q. Can you tell how much you paid in cash, and to whom, for said note?

A. I cannot tell the exact amount; but I suppose my bank account would show the check. I paid the money to Moses Kelly.

25 (Counsel for defendant asks the witness to ascertain the exact amount of such check, and to produce said check if it is under her control.)

Q. You did not see or have in your actual possession, the note in question until it was withdrawn by you from the bank, did you?

A. I did not.

Q. Annexed to the note which has been exhibited to you, and which is marked Exhibit "H. C. K. No. 1," is an affidavit made by you, as appears by the certificate of the clerk on November 12, 1877, about how long before this affidavit was made was the note taken from the bank?

A. I do not know.

Q. What did you do with the note when you withdrew it from bank?

A. I sent it to Mr. W. W. Boarman immediately.

Q. Was it more than two or three months before the action at law was brought on the note that you withdrew it from bank?

A. I cannot recollect at all.

Q. When Mr. Kelly handed you the memorandum-book did he state to you whether the note which had been deposited to your credit was in any way secured?

A. He did.

Q. Did he state how it was secured, or upon what?

A. I don't think he did. He said it was "well secured."

Q. That was all that was stated at the time by Mr. Kelly, was it?

A. It was.

Q. Did you make any inquiries of other persons than Mr. Kelly as to the security, at or about the time the note was deposited to your credit?

A. I did not.

Q. You relied entirely upon Mr. Kelly's statement?

A. I did.

Q. Were you acquainted with Mr. Kelly, and did you have confidence in him?

A. I was and did.

Q. After this memorandum-book was handed to you, how long was it before you made any further inquiries of Mr. Kelly about the note in question?

A. I think about five or six months after that.

Q. What caused you to make inquiry at that time?

A. I don't know what my motive was. I had been in the habit of going to see him on business, and happened to ask him the question at the time

Q. What question did you ask at this time?

A. Well, I said, "Mr. Kelly, suppose anything happens to
26 you, what about my note?" He again assured me it was well secured.

Q. Did he tell you how it was secured on this occasion?

A. He did not.

Q. How long after this last occasion did you again make inquiries of him about the note?

A. I don't remember how long a time elapsed, but it was at the time I heard of his failure. (At that time he told me that Dr. Ashford would be responsible.)

[So much of the answer as is within the marks () excepted to as not responsive.]

Q. At the time of the last interview mentioned, was the note due or not?

A. I think it was due.

Q. Did you make a demand, at this last interview, upon Mr. Kelly for payment of the note?

A. I did.

Q. Did you then inquire upon what property it was secured?

A. Well, then, Mr. Kelly told me that he had turned the property upon which the note was secured over to Dr. Ashford, and that he, Dr. Ashford, was responsible.

(Answer excepted to as not responsive to the question.)

Q. Question repeated.

A. I did not of Mr. Kelly.

Q. Did you of any one?

A. No, I did not; but turned the note over to Mr. Boarman for examination as to the security for it.

Q. This was at the time that you turned the note over to Mr. Boarman, as heretofore stated by you?

A. Yes.

Q. In the interval between the time of the last interview mentioned with Mr. Kelly and the time when you turned the note over to Mr. Boarman, did you apply to any one for the payment of the note?

A. I did not.

Q. During all the time the note in question was in the bank you regarded it as your note—as belonging to you—did you not?

A. I did.

Q. At the time when this note became due did you have any particular use for the principal or interest of the note?

A. No; I did not.

Q. You were not dependent in any way upon such principal or interest for your support?

A. Not my immediate support.

Q. Did its non-payment incommode you?

A. In a measure, it did.

Q. Slightly or otherwise?

A. Well, slightly, I may say.

HENRIETTA C. KELLER.

27 Subscribed and sworn to before me this 9th day of January, A. D. 1882.

JOHN B. THOMPSON,
Examiner in Chancery.

ARCHIE THOMPSON, a witness produced and sworn on behalf of the complainant, deposes and says as follows:

I am now, and was in 1876, a carpenter and builder. I was also such in 1875.

Q. State when you became the owner of lots 4, 5, 6, 7, 8, and 9 in Kelly's subdivision of square No. 889, in this city.

A. In 1875 and 1876.

Q. How did you become the owner?

A. I became the owner from Abner B. Kelly and Mr. Cate and wife; from the former I got lots 4, 5, and 6, and from the latter lots 7, 8, and 9.

Q. Did you improve the lots?

A. I did.

Q. Did you put a house on each; if so, what did the house cost?

A. I did; each house cost $2,900.

Q. Were they clear of encumbrance when you bought the lots?

A. They were so supposed; they were conveyed to me to be clear of all encumbrances.

Q. Did you put a deed of trust on lot (5) five to secure Abner B. Kelly in the sum of $1,500?

A. I did.

Q. Did you subsequently put a deed of trust on lot number five (5) to secure Moses Kelly in the sum of two thousand dollars?

A. That is my note; but I have no recollection of signing a deed of trust to secure it.

Q. Look at the note and tell me whether it does not appear upon its face that it is secured on lot five (5) in square 889?

A. It looks so; yes, sir. I want to say, also, that I gave Mr. Kelly accommodation notes on the same form and not secured. I do not mean to say that these accommodation notes had the number of the lot and square on them. They had the words "secured by deed of trust."

Q. Do you know the handwriting of Moses Kelly?

A. I do, sir.

Q. Look at the words endorsed on said note, viz: "Moses Kelly, Henrietta C. Keller, by M. K.," and tell me in whose handwriting those words are.

A. Moses Kelly's.

28 Q. After the deed of trust for $1,500 to Rohrer, trustee, on lot five, and the note in question for $2,000 were executed by you, did you convey lots five, seven, eight and nine in Kelly's subdivision, in square No. 889, to the defendant Francis A. Ashford?

(Objected to by Mr. Edmonston, on the ground that it is attempting to prove by parol what can only be proved by record evidence.)

A. Well, now, that is a question that I cannot positively answer. I conveyed them either to Abner B. Kelly or to Francis A. Ashford. It seems to me that I conveyed this property to Abner B. Kelly and that from him it was conveyed to Dr. Ashford; but I can't positively say.

Q. The conveyance may have been made directly to Dr. Ashford, might it not?

A. It might of been; but it never ought to have been to either one of them.

Q. Is the signature to the note for $2,000, which has just been shown you, your signature?

A. It is.

Q. When you made the conveyance of these last mentioned lots to Dr. Ashford, or to Mr. Abner B. Kelly, was the grantee to assume the encumbrances upon them and relieve you from liability?

(Objected to as leading and inadmissible.)

A. He was, and I was to be relieved from all liability.

Q. Do you mean to say that you were to be relieved from all liability for the encumbrances then existing on these lots, and the notes you had given secured by deeds of trust on them?

(Objected to for the reasons stated for the objection to the last question.)

A. I deeded them as such.

(Answer objected to.)

Q. Was any consideration paid to you for making the conveyance to Dr. Ashford or Mr. A. B. Kelly?

A. None whatever to my knowledge.

Q. At the time you conveyed lots 5, 7, 8, and 9, either to Ashford or A. B. Kelly, had you placed, since your purchase of these lots, a building on each of them?

A. I had put a house on each lot.

Q. Were the houses all alike?

A. Yes.

Q. Are you familiar with the values of real estate in the city of Washington?

A. In that section of the city I was at that time.

Q. What, in your opinion, was the value of each house and lot at the time of their conveyance by you?

A. Four thousand dollars apiece.

29 Cross-examination by Mr. EDMONSTON:

Q. The signature of the note shown you is the only part of it in your handwriting, is it not?

A. It is.

Q. The words *in* figures, "on lot 5, sq. 889," are not in your handwriting, are they?

A. No, sir.

Q. Have you any recollection of having signed this note aside from the fact that you now recognize the signature to be yours?

A. No, sir; I know my signature and that is all.

Q. Did you ever have any negotiations with Dr. Ashford about any property in square No. 889?

A. No.

Q. Were you acquainted with Dr. Ashford?

A. No, sir; and am not now.

Q. If you ever executed a deed purporting to convey property to Dr. Ashford, you did not deliver the deed to him, did you?

A. I did not.

Q. And you never had any agreement with Dr. Ashford in regard to the payment of your debts, did you?

A. None whatever.

Q. You never received anything for the note for $2,000 which has been shown you?

A. I received some cash from Moses Kelly, but cannot say whether it was from the proceeds of that note or not.

Q. When lots 7, 8, and 9, in square 889, were conveyed to you, did you not put a deed of trust for $2,000 on each?

A. To the best of my knowledge and belief, I did.

Q. Were these trusts paid and released from the property prior to the time when you executed a deed purporting to convey those lots?

A. I deeded them subject to those deeds of trust when I deeded them to Ashford or Kelly.

Q. Did any one ever approach you about having you enter a suit against Dr. Ashford?

A. Yes.

Q. Who approached you about this?

A. Mr. Boarman, the counsel for the complainant, who is here present.

Q. What did you say to that?

A. I told him that if there was any way in which I could relieve myself of the judgment against me I would willingly do so.

Q. What did he say as to that?

A. I cannot recollect, sir.

30 Re-direct:

Q. You have stated on cross-examination that you placed a deed of trust on each of lots 7, 8, and 9 for $2,000 each. Did you pay out any money in satisfaction of these deeds of trust?

A. The deeds of trust were for either $1,500 or $2,000. I paid nothing on them.

Q. When you executed the deed to Dr. Ashford, or to A. B. Kelly, for the four lots in question, to whom did you deliver it?

A. Moses Kelly.

Q. Did Moses Kelly then have any conversation with you as to the purchaser assuming payment of the then existing encumbrances on the property, if so, what did he say to you?

(Objected to because the question is leading, and because the statements of Kelly are not evidence against the defendant in this suit.)

A. Mr. Moses Kelly had a conversation with me. He came out to my house one night between 9 and 10 o'clock with Squire Mills. I had retired to bed; he rang the bell and woke me up; I looked out the window and asked who was there; he said: "It is Mr. Kelly. Come down, Mr. Thompson, I wish to see you." I went down and let him in, and when he came in he said: "Mr. Thompson, I suppose you are surprised to see me this time of night." I made a reply telling him that I was, it being such a bad night. It was raining. He said: "Mr. Thompson, I have come out to see you if you would not do me a favor;" that he had some money to pay in a day or so and that he wanted me to help him do it. I said: "Well, Mr. Kelly, I'll do all I can to help you;" he then said: "Mr. Thompson, I've got some deeds here I want you and your wife to execute, transferring lots 5, 7, 8, and 9," and other property. I said: "Mr. Kelly I don't like to do anything on such a short notice, and transfer all my equity away without knowing how I am to be secured;" that there were a heap of outstanding notes and other things that had to be paid; that this property was supposed to take care of some of them. He said, Mr. Thompson don't be alarmed, for before I'd take a cent from you I'd give you a dollar. He said that if I would deed him the property he would see that all debts and outstanding notes that might be against me should be paid, and furthermore that his son had some ground that he would deed to me which would pay me and keep me going. I made the
31 deeds to him on these grounds, but greatly against my will. I executed the deeds there and gave them to him.

Q. Did you then execute and acknowledge before Mr. Mills,

notary public, a deed conveying lots 5, 7, 8, and 9, either to Dr. Ashford or to Mr. A. B. Kelly?

(Objected to.)

A. I did.

ARCHIE THOMPSON.

Sworn to and subscribed before me this 16th day of December, A. D. 1881.

JOHN B. THOMPSON,
Examiner in Chancery.

WILLIAM W. BOARMAN, a witness produced and sworn on behalf of the complainant, deposes and says as follows:

I am a member of the bar of the supreme court of the District of Columbia.

Q. Did the complainant place in your hands a note for collection and, if so, about what time was it given to you?

A. She did; some time about the summer of 1877.

Q. Will you look at the note now shown you, marked Exhibit "H. C. K., No. 1," and state whether that is the note?

A. It is.

Q. Did you examine the title to the property upon which this note is secured?

A. I did not make an entire, but to the best of my recollection only a partial, examination. The result of my partial examination was the finding of several deeds touching the property upon which the note in question was secured.

[The complainant's counsel here offers in evidence a deed from Abner B. Kelly and wife to Archie Thompson, dated July 5, 1875, and recorded August 21, 1875, in Liber No. 793, folio 361, of the land records for the District of Columbia, which said deed, the counsel for the defendant admits, purports to convey in fee-simple lots 4, 5, and 6 of Kelly's subdivision of square 889, for the consideration of $2,880. Also a deed from Fernando C. Cate and wife to Archie Thompson, dated March 1, 1876, and recorded March 11, 1876, Liber No. 814, folio 195, of said records, purporting to convey in fee-simple lots 7, 8, and 9 of said subdivision in said square for the consideration of $3,000.

32 [The complainant's counsel also offers in evidence a certified copy of a deed of trust, dated August 17, 1875, and recorded August 21, 1875, in Liber No. 793, folio 363, one of said records, from Archie Thompson to Martin M. Rohrer, to secure Abner B. Kelly's note for $1,500, said deed of trust being marked "H. C. K., Exhibit No. 1," to the bill filed in this cause, and purporting to convey lot No. 5 in Kelly's subdivision of square No. 889.

Also a certified copy of a deed of trust from Archie Thompson and wife to William A. Gordon, trustee, dated February 1, 1876, and recorded March 11, 1876, in Liber No. 814, folio 199, of said records, to secure Moses Kelly's note for $2,000, dated February 21,

1876, and payable one year after date, said deed of trust being marked "H. C. K., Exhibit No. 2," to the bill filed in this cause, and conveying to said Gordon lot No. 5 in Kelly's recorded subdivision of square No. 889, together with the improvements, to secure said note.

Also a certified copy of a deed in fee from Archie Thompson and wife to Francis A. Ashford, dated January 1, 1877, and recorded January 22, 1877, in Liber No. 845, folio 172, *et seq.*, of said records, and conveying to said Ashford lots 5, 7, 8, and 9, in Kelly's recorded subdivision of square No. 889, the said deed being marked "H. C. K. Exhibit No. 4," to the bill filed in this case. [Mr. Edmonston, for the defendant, objects to the last two mentioned exhibits as evidence of anything other than that they are true copies of the records from which they are taken, and certified to be such by the recorder; and he specially objects to them as evidence of the delivery of said deeds, of which said exhibits purport to be copies, to the grantees respectively named in said deeds; and he also objects to the last-mentioned deed as evidence of any agreement on the part of the defendant to this case.]

Adjourned at 5.20 o'clock p. m., until Monday, December 19th, 1881, at 2 o'clock p. m.

Monday, December 19th, 1881, met at 2 o'clock p. m., pursuant to adjournment; whereupon, counsel for both parties being present, the examination of W. W. Boarman is resumed as follows:

33 [The counsel for the complainant here offers in evidence deed of trust on lot No. 9, in square No. 889, Kelly's subdivision, from Archie Thompson and wife to William A. Gordon, trustee, dated Mar. 1, 1876, and recorded Mar. 21, 1876, in Liber No. 816, folio 198, of the land records of the District of Columbia, to secure Moses Kelly $2.000. Also a deed of trust from same to same, dated March 1, 1876, and recorded March 21, 1876, in Liber No. 816, folio 199, of said records, on lot No. 8, in square No. 889, Kelly's subdivision, to secure Moses Kelly $2,000. Also deed of trust from same to same, dated March 1, 1876, and recorded March 21, 1876, in Liber No. 816, folio 201, of said records, on lot No. 7, in square No. 889, Kelly's subdivision to secure Moses Kelly $2,000.] [Mr. Edmonston, counsel for the defendant, here gives notice to the counsel for the complainant to produce the deeds of trust embraced by the foregoing offer.]

Q. After this note was placed in your hands by the complainant, did you call to see the defendant, Dr. Ashford, in relation to it; if so, state as accurately as you can the time you called to see him, and the conversation you had with him on the subject?

A. After the note was placed in my hands for collection I called to see the defendant in this case, Dr. Francis A. Ashford, in regard to its settlement. The exact time I visited him for that purpose I cannot state, but it was some time in the month of August, or, at the latest, in September, 1877. I called to see him several times. At the first interview I explained the reasons of my visit, and asked

what disposition or settlement he intended to make of the note, and when he would pay it. He informed me that he would soon pay some on the interest then due on the note, and would shortly thereafter arrange for its full settlement. He informed me that he had expended money in paying interest to Mr. John C. Harkness, who held the note secured by first mortgage for $1,500, and had also paid same taxes on lot five (5), in square 889—the property which had been conveyed to secure the $1,500 note above mentioned. At the first interview I informed Dr. Ashford that, from my examination of the land records of this city, I had discovered a deed conveying said lot to him in fee, subject to the encumbrances resting on the same. I also informed him what encumbrances I had found, and that the $2,000 note held by Miss Keller was secured by one thereof. In regard to its payment, he said that he was not then able to state defi-
34 nitely at what time he would be able to pay; but said that so soon as a gentleman, whom he did not then name, returned to the city, he thought he would be able to arrange for its settlement. I saw him several times in regard to the payment of the note, and tried in various ways to settle upon some plan of payment. One, I recollect I proposed, was for him to pay off the first mortgage on said lot, and for this purpose, with his knowledge, I attempted to make arrangements with Mr. Harkness, who held the note secured by the first mortgage. This plan, however, fell through by reason of Mr. Harkness' unwillingness to allow the payment of the note he held to be anticipated, as he held it as trustee.

Q. At your first interview with Dr. Ashford, did you make a demand or request for the payment of the $2,000 note?

A. I did make such request.

Q. Dr. Ashford states, in his answer, that no demand was made upon him by you for the payment of the note until the month of February, 1878. Is that statement correct?

(Objected to.)

A. I am sure he is mistaken.

Q. At the first interview with Dr. Ashford, did you inform him that the deed from Thompson and wife to him showed that he (Ashford) took the property subject to the encumbrances existing thereon, and that the payment of these encumbrances was assumed by the grantee?

(Objected to as leading.)

A. I did.

Q. When you informed Dr. Ashford of these provisions in the deed, and stated to him that the complainant held the note for $2,000, secured by deed of trust on lot five (5), did he say anything to you to lead you to believe that he was or was not ignorant that the deed of trust in question rested upon the property?

(Objected to for the reason that the inferences of the witness are not evidence, and that the question calls for inferences; and, further, because the question is leading.)

A. I do not know that he did or did not. I do know that the result of the first interview was as I have already stated—that while he could not then settle the note in question, he would pay some of the interest due thereon, and try to arrange for its final settlement very soon.

(Answer excepted to.)

Q. When you first told Dr. Ashford that your client held the note secured as above stated, did he or did he not deny his responsibility to pay the same?

35 A. I do not remember that he made any such denial in express terms to that effect, or stated anything that could lead me to any such conclusion. In fact, he promised to pay the interest then due in a short time, and arrange for the settlement of the note as soon as he could see a gentleman who was then absent from the city.

Q. To the best of your recollection and belief, at this first interview, did Dr. Ashford in any way deny his liability or accountability to pay the note for $2,000?

(Objected to as leading, and for other reasons.)

A. He did not. The question was not discussed.

Q. After the interview in question, did you, on or about October 3, 1877, receive a note from Dr. Ashford?

A. I did.

Q. Look at the paper now shown you, and state whether it is a note you received from Dr. Ashford.

A. It is.

(Paper here, having been shown to the witness, is filed and marked "Exhibit No. 1, W. W. B.")

(EXHIBIT No. 1, W. W. B.)

"1330 NEW YORK AVENUE,
"WASHINGTON, D. C., *October 3d*, 1877.

"MY DEAR SIR: I paid Mr. Harkness $150 March 5th, 1877, which was interest to Feb. 17th, 1877. I paid him also, on Aug. 17th, 1877, $75.00, which was interest to that date. I have both receipts.

"I believe you are right. I did not pay the special taxes, having been advised not to do so inasmuch as it was not a lien on the property.

"I paid the general tax for two years back (it had been sold once), bringing it up to June 30th, 1877. It is assessed at $2,388.00.

"In all I have paid, including two installments of water tax, $279, and rec'd for rent $175, so that I am out just about $100.

"If Miss Keller, for whom I have a very kind feeling, is wise, she will take the house and lot, although it is against my personal interest to so advise. It is fully worth what it will stand her. It is a much better-finished house than the others which look so much like it.

"It would have saved her much needless expense to have
36 accepted my honest proposition in the beginning, as it would have avoided advertising and commission expenses.

"Very truly, ASHFORD."

Q. Dr. Ashford says in this note that if Miss Keller "is wise she will take the house and lot, although it is against my personal interest to so advise. It is fully worth what it will stand her." Had you, before the receipt of this note, talked with Dr. Ashford as to the value of the house and lot referred to? If so, state what house and lot was meant, and state if anything was said to you by Dr. Ashford relative to its value.

A. Yes; I had had such a conversation, no doubt, with him. Such conversation was in relation to the property conveyed to secure the $2,000 note. As to the last portion of the question I have now no distinct recollection that he stated the property to be worth any particular sum, but intimated that Miss Keller would be secure by taking the property in satisfaction of her claim, as the property was then encumbered.

Q. Do I understand you to mean that Dr. Ashford intimated to you, in an interview before October 3, 1877, that if Miss Keller took the property, namely, lot five (5) and the improvements thereon, it would be worth to her a sufficient sum to pay off or satisfy the $1,500 deed of trust, and also to pay or satisfy the $2,000 note held by her, with interest?

(Objected to.)

A. I so understood, and not agreeing with him in this particular I declined to advise Miss Keller to entertain the proposition.

Cross-examination by Mr. EDMONSTON:

Q. Have you any memoranda which will show the time when the note in question was received by you for collection?

A. I have not.

Q. From whose hands did you receive the note?

A. My recollection is that I got it from my father, to whom it had been given by Miss Keller to be delivered to me.

Q. Within what time after the receipt of this note by you did you see Miss Keller?

A. Within a short time.

Q. Before you called upon Dr. Ashford the first time, or not?

A. Yes; before I called upon him the first time; such is my recollection.

37 Q. What instructions or information did Miss Keller give you about the collection of the note or the property upon which it was secured?

A. She told me to collect it, but I do not remember that she stated anything about the property.

Q. Did she tell you from whom you should collect the note?

A. After I had put her in possession of such information as I had, arising from an examination of the land records, she told me to

proceed to collect the note the best way I could. She left that to me as her counsel.

Q. What information did you put her in possession of after your examination of the land records?

A. I informed her that her note was secured by a second mortgage only, and that the property had been conveyed to Francis A. Ashford; and that the deed to him contained a clause wherein he assumed the payment of such encumbrances as then rested on the property.

Q. Before this interview with Miss Keller had you had an intimation from any one that Dr. Ashton might be liable for the payment of said note?

A. Not from any person. I considered him responsible when I discovered the clause already alluded to making him so in the deed conveying the property to him.

Q. Did you inform Miss Keller at this interview that you considered Dr. Ashford responsible for the payment of that note?

A. I suppose so. I do not see any reason why I should not so have done.

Q. What is your recollection upon the subject?

A. I must have put her in possession of such facts as I had gathered from my examination of the land records. Such is my recollection.

Q. Did she not inform you first that Dr. Ashford should be held responsible?

A. I don't think she knew of Dr. Ashford's responsibility until I informed her to that effect.

Q. Have you your rough notes of examination made at that time?

A. I cannot say that I have.

Q. Have you any notes of title referring to this lot?

A. I have memoranda and scraps of paper, but I cannot say that such memoranda were the result of my examination of the records prior to any interview with Miss Keller. All I remember is that I noted down such information as I gathered from the records.

Q. After your interviews with Ashford did you com-
38 municate the result by letter to Miss Keller?

A. I do not now remember whether I did or not. It is very likely I wrote to her on the subject.

(Counsel for the defendant here gives notice to the complainant to produce any letters she may have in her possession or under her control from the witness relating to his interviews with Ashford.)

Adjourned at 4.45 p. m., until Wednesday, December 21, 1881, at 2 o'clock p. m.

December 21, 1881, met pursuant to adjournment at 2 o'clock p. m., and again adjourned until Wednesday, December 28, 1881, at 1 o'clock p. m.

Wednesday, December 28, 1881, met at 1 o'clock p. m., pursuant

to adjournment; whereupon, counsel for all the parties being present, the cross-examination of W. W. BOARMAN is proceeded with as follows:

By Mr. EDMONSTON:

Q. Did you receive any written communication from Dr. Ashford other than the letter which has been put in evidence?

A. I received a postal card dated October 29, 1877.

Q. Have you that postal card? If so, will you produce it?

A. I have and now produce it.

(Postal card produced and marked Exhibit No. 2, W. W. B.)

(EXHIBIT No. 2, W. W. B.)

"OCTOBER 29, '77.

"Mr. BOARMAN.

"MY DEAR SIR: Will you please wait until I can see you, as I have serious doubts about my ability to meet any note, as suggested this a. m. If I could see a strong probability that the collateral proposed would be realized, then I would feel free to close the matter at once.

"Yours very truly, ASHFORD."

Q. Was it after the receipt of this postal that you en-
39 tered suit against Archie Thompson and Moses Kelly on the note in controversy?

A. It was. The suit was commenced November 13, 1877.

Q. If you considered Dr. Ashford personally liable for the payment of the note in question, why did you not enter suit against him at the same time that suit was entered against Thompson and Kelly?

A. Because at that time interviews between Dr. Ashford and myself in regard to his settlement of this note had not ceased; and, further, because a postponement of any action against him under the clause in the deed making him personally liable would not affect his liability.

Q. When did your interviews with him on the subject of the payment of the note cease?

A. I cannot state the exact time, but they probably ceased when he peremptorily refused to pay the note in question, which was, perhaps, a month or a little more before the filing of the bill in this case; it may have been two months before.

Q. Can you state positively that there was any interview between you and Dr. Ashford between the time when the suit at law against Thompson and Kelly was filed by you and a month or two prior to the equity suit?

A. O, yes; I generally spoke to him whenever I happened to meet him on his rounds to see his patients—I mean I spoke to him in regard to this matter.

Q. Did you inform him that you had entered suit at law against Thompson and Kelly on the note?

A. I do not remember.

Q. After the first interview with Dr. Ashford do you know whether you or Miss Keller went out to look at the property mentioned in the bill, to wit, lot 5 and improvements?

A. I know that I went out to see the property mentioned, but I cannot say positively now whether Miss Keller accompanied me, nor can I state with any certainty whether the time of such visit was prior or subsequent to the interview to which you refer.

Q. Was it after you had examined the record as to lot five?

A. Yes, sir.

Q. Were you or Miss Keller present when the property was sold by Rohrer, trustee, under the first deed of trust?

A. I was there, but Miss Keller was not.

Q. Were you there as attorney for Miss Keller?

A. I was.

40 Q. Were you authorized by her to bid for the property; and, if so, what was the maximum limit which you were authorized to bid?

(Question objected to by counsel for complainant.)

A. I was there under no authority from her to bid for the property at any price. and I doubt if she knew I intended to go.

Redirect by Mr. WASHINGTON:

Q. When you examined the deed from Archie Thompson and wife to Dr. Ashford, in the office of the recorder of deeds, did you find any memorandum written on the margin opposite the record of the deed; and, if so, what was it?

(Objected to as incompetent and inadmissible.)

A. I did find a memorandum that the deed had been delivered to the grantee on February 19th, 1877.

(Answer excepted to for the same reason that the question was objected to.)

Q. Have you, during your examination, given any notice, as counsel, to Dr. Ashford and Moses Kelly in relation to this deed; and, if so, what was the substance of such notice?

A. I have; one letter I wrote to Dr. Ashford and one to Moses Kelly, the purport of both being the production of the deed just mentioned.

Q. Has the deed in question been produced before the examiner, in compliance with the request contained in said notice?

A. I am informed by the examiner that no such deed has been produced. I state that I do not see any such deed before him.

(Counsel for defendant, without waiving his objection to the question and answer above concerning the marginal note on the record in the office of the recorder of deeds, asks the following question:)

By Mr. EDMONSTON:

Q. Was not the entry in question shown by you to the deputy recorder of deeds in the presence of myself, and did not the said deputy then state that the entry did not show that the deed was necessarily delivered to Dr. Ashford in person, but that the same entry would have been made had the receipt for the deed given by the recorder, when the deed was left for record, been presented by any other person than the grantee?

A. I think your question contains a true statement of what the deputy recorder said.

WM. W. BOARMAN.

41 Sworn and subscribed before me this 28th day of December, A. D. 1881.

JOHN B. THOMPSON,
Examiner in Chancery.

The complainant's counsel here offers in evidence a paper purporting to be the original deed of trust from Archie Thompson and wife to William A. Gordon, trustee, to secure the payment of the $2,000 note given to Moses Kelly, and the same is herewith filed, marked "H. C. K. Exhibit No. 5;" to which said offer the defendant's counsel objects, for the reason that the deed is of itself incompetent and inadmissible without proof of its execution and delivery.

The complainant's counsel also offers in evidence a deed from Francis A. Ashford and wife to Thomas Duncan, dated December 4, 1877, and recorded December 17, 1877, in liber No. 871, folio 421, of the said land records, purporting to convey, in fee simple, lots 7 and 8, in Kelly's subdivision of square No. 889, for the consideration of $3,000, subject to existing incumbrances thereon.

Counsel for the defendant objects to the offer of the deed, because it is incompetent and irrelevant, and objects to the statement of counsel for the plaintiff as to the purport of the deed as incompetent evidence.

The complainant's counsel here rest.

Deposition-in-Chief for the Defendant. Filed March 9, 1882. *R. J. Meigs, Clerk.*

It is hereby stipulated and agreed by and between counsel for the respective parties to this suit that upon the hearing of this cause the records of the following deeds, heretofore offered in evidence by the complainant, may be referred to with the same force and effect as if duly certified copies of said deeds had been filed with the examiner—that is to say:

Deed from Abner B. Kelly and wife to Archie Thompson, recorded in liber No. 793, folio 361.

Deed from Fernando C. Cate and wife to Archie Thompson, recorded in liber No. 814, folio 195.

42 Deed from Archie Thompson and wife to William A. Gordon, trustee, recorded in liber No. 816, folio 98.

Deed from Archie Thompson and wife to William A. Gordon, trustee, recorded in liber No. 816, folio 199.

Deed from Archie Thompson and wife to William A. Gordon, trustee, recorded in liber No. 866, folio 201.

Deed from Francis A. Ashford and wife to Thomas Duncan, recorded in liber No. 871, folio 421.

W. E. EDMONSTON,
Sol'r for Defendant.
R. B. WASHINGTON,
For Compl't.

Met at 2 o'clock p. m., on Wednesday, January 18, 1882, at the office of Messrs. Appleby & Edmonston, pursuant to agreement.

Present: The defendant and counsel for both parties.

Whereupon FRANCIS A. ASHFORD, a witness of lawful age, produced and sworn on behalf of the defendant, deposes and says as follows, to wit:

Question by Mr. EDMONSTON:

Doctor, you were notified to produce a certain deed before the examiner on December 21, 1881, the same being, as stated, a deed to you from Archie Thompson and wife, dated January 1, 1877. Please state what you did after the receipt of the notice, and what you know about the deed mentioned, or its whereabouts.

A. After I received that notice I looked over my papers, but found no such deed. I have no memory of any such deed or of ever having seen it, nor of ever having it in my possession.

Q. What business relations or transactions, if any, have you ever had with Archie Thompson?

A. None that I have any knowledge of. I don't think I ever saw him, and would not know him now.

Q. What negotiations, if any, did you ever have with any one about the purchase by you of the property mentioned in the bill in this case, to wit, lot 5, in square 889?

A. I never had any negotiations with anybody about its purchase.

Q. You collected for a time the rents of the house built on
43 this lot. Please state the circumstances which led to your collecting the rent.

A. Yes; I collected the rents for a time. Some time in February (I think it was in February, 1877) Mr. Kelly, to whom I had loaned money to a considerable amount previously, and whose notes I had also endorsed at sundry times previously, stated to me that in order to secure me as much as possible from loss he had had deeded to me several houses and lots in which he thought there was considerable equity; that there was an incumbrance on the property; I don't know on which lots nor the amounts; he did not state the separate amounts, but said there was an incumbrance on them; but he did say that on one house and lot there was an incumbrance, secured by deed of trust of $1,500 to Mr. J. C. Harkness, and that

the interest on this was pressing; that if I would pay the interest to Mr. Harkness so as to prevent sale that when he, Mr. Kelly, was well enough, he then being sick in bed, he would relieve me of any further trouble in the matter; that he intended to take care that the incumbrance should not worry me, I stating at the time that my professional duties would prevent my looking after the property; he stated also that I had better go on and collect the rents from this property so as to indemnify myself for the interest I was to pay Mr. Harkness, amounting to $150.00, and also to pay arrearages of taxes.

Q. Was that the first intimation that you had of the existence of any deed to you of the property?

A. It was.

Q. Was there any understanding with Mr. Kelly or any one that you should take this property at any stipulated price?

A. There was not.

Q. What knowledge, if any, had you of the contents or purport of the deed or other instrument by which the property had been conveyed to you?

A. None, except as I have already stated.

Q. Did you know or were you informed by whom the property had been conveyed or deeded?

A. No.

Q. When and how did you first learn that there was on record what purported to be a second trust on lot 5?

A. The first knowledge I had of it was through Mr. Boarman, the counsel in this case, who, I think, came to me to get me to pay the interest or collect it.

Q. Please state, as nearly as you can, what occurred between Mr. Boarman and yourself at your interview in relation to the subject of the note held by Miss Keller.

44 A. I manifested much surprise to learn that there was such an incumbrance on the property, and declined to pay the interest. Before leaving Mr. Boarman I stated that there must be some mistake about it, and that I would see Mr. Kelly concerning the matter, but that if such an incumbrance did exist I should decline to accept the property; that I would not pay any interest nor would I be responsible for the note.

Q. What, if anything, was said at this or subsequent interviews between you and Mr. Boarman about your conveying the property to Miss Keller?

A. At one interview, most probably the second, I told Mr. Boarman that I was sorry for Miss Keller, and that I would convey the property to her so that she would be saved costs of advertising and sale, and so that she could get the benefits of the rent; that I had already paid out in interest and taxes on that property more than I had received in rents, and that I would advise her to take the property, inasmuch as the rents would pay her a very good interest, both on the amount she had loaned on the property and the amount of the mortgage held by Mr. Harkness; that I had paid Mr. Harkness a year's back interest, and that I had paid him also the semi-

annual interest, which was interest up to, I think, August, 1877, and that I had also paid two years or more arrears of taxes upon this same property, but that I absolutely refused to accept or be bound by any such deed as he had represented the deed to be.

Q. When did this interview occur?

A. We had several interviews, so that it is difficult to fix what occurred in each one separately. One matter seemed to develope upon another. At the first I do not think anything was said about my being responsible for the payment of the principal of the note, but only the interest and the ordinary consequences of the non-payment of the interest. I mean by that, the sale of the property. It was a long time after the first interview with Mr. Boarman, possibly it might have been at the second interview, although I think much later, when he attempted to convince me that I was personally bound for the payment of the principal of that note; this, I think, was in the spring following our first interview. I know it was in the spring.

Q. At the first interview was any suggestion made about
45 a sale of the property for the non-payment of the interest?

A. I do not remember that there was.

Q. Was anything said by Mr. Boarman at this first interview why he had approached you about the payment of interest?

A. Only so far as I remember that the note had been put into his hands as attorney for Miss Keller. This he stated when he first broached the subject to me.

Q. Did he state why he applied to you instead of to the parties to the note?

A. I do not know that he did. I don't remember.

Q. From the property conveyed as alleged in the bill did you derive any profit or advantage?

A. I lost money on each and every of the houses mentioned in the deed from Archie Thompson to myself, not knowing, however, at the time that the deed was from him.

Q. Did you ever authorize any one to accept on your behalf the alleged deed from Thompson to yourself?

A. No.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. As soon as I learned that there was a second mortgage upon this property I notified Mr. Harkness, the holder of the first mortgage, and to whom I had been paying interest on the mortgage he held, that I declined to be responsible any longer for interest upon said mortgage, inasmuch, having learned that a second mortgage existed of $2,000. which I regarded as making the property valueless to me; that I declined being responsible, and that he could sell the property to secure himself whenever he felt himself justified, believing that without such notice he would rely upon me to pay the regular instalment of interest, inasmuch as I had already been so doing.

Cross-examination by Mr. WASHINGTON:

Q. You have stated that some time in February, 1877, Mr Kelly said to you that he had had deeded to you several houses and lots; did he specify where these houses and lots were located?

A. He did; either at that time or at some subsequent time soon after. I do not remember whether he did at that time or not.

46 Q. Did he then state to you that there were encumbrances or liens or deeds of trust on the property?

A. He told me that there was an encumbrance on the property, but that there was a considerable equity in each, and, moreover, that as soon as he could get about again he would so manage that they would be of no annoyance or trouble.

Q. I repeat the question and request a direct answer.

A. Yes; but he did not specify nor did I enquire at that time, which of the houses and lots had a mortgage upon it; but the only one spoken of was the one held by Mr. Harkness, and upon which there was a year's interest in arrears.

Q. You have stated that Mr. Kelly wanted you to pay the interest due to Mr. Harkness on the deed of trust for $1,500, and that when Mr. Kelly was well enough he would relieve you of any further trouble in the matter. Why, then, did you make a second payment of interest to Mr. Harkness in August, 1877, having previously paid the interest in March, 1877?

A. Because Mr. Kelly was still sick, for one reason, and, moreover, because I had told Mr. Harkness when I paid the interest in arrears that I would see that it was paid punctually thereafter so long as I held the property.

Q. Did you continue to collect the rents of the house on lot five, in square 889, until the 14th day of March, 1878, the date of the sale to Mr. Harkness, as you allege in your answer?

A. Yes; I believe I did.

Q. When did you commence to collect these rents?

A. That I cannot state exactly without refreshing my memory.

Q. Was it not within a short time after your being notified by Mr. Kelly of the conveyance to you?

A. I think about one month after.

Q. Did you not also collect rents from the other three houses conveyed by the same deed; and, if so, when did you commence to collect them, and how long did you continue to collect them?

A. I collected from some of them—which I do not now remember—from others I collected none. I am positive about the latter.

Q. Did you not collect or attempt to collect rents from four houses on "H" street, between 7th and 8th streets, N. E., pursuant to the understanding which you had with Mr. Kelly?

A. Yes.

Q. Did you pay any taxes on these houses and lots; and,

47 if so, about what time were the payments made?

A. My impression is that I paid several years' back taxes on all of them. I think it was in February, 1877, Mr. Harkness inquired if the taxes had been paid, and I stated to him either that

they had or that they would be, I forget which. Upon refreshing my memory by a memorandum I find that I paid the taxes for two years on the property in which Mr. Harkness was interested, and probably for all the houses at the same time. These taxes were paid up to June 30, 1877.

Q. Did Mr. Kelly ever have other property conveyed to you except that described in the deed from Archie Thompson to you, upon which you paid interest or taxes or from which you collected rents?

A. To the whole question I say no. Mr. Kelly did have some ground conveyed to me, the date of which I do not remember, upon which I paid the taxes due, but from which I received no rent.

Q. Was this ground conveyed to you by some person other than Mr. Kelly, at Mr. Kelly's instance, and did you accept the ground under the deed and hold it and treat it as your own?

(Objected to by counsel for the defendant as not material and not pertinent.)

A. Yes; I bought it and paid money for it at the time.

Q. Did Mr. Kelly act as your agent?

A. No.

Q. Are you certain that you never saw the deed from Archie Thompson and wife to you, or that it was not left among your papers?

A. Yes; I am certain.

Q. When Mr. Boarman first called to see you did he not tell you that in the deed conveying one of the houses in question to you there was a provision that the grantee should assume the payment of the incumbrances?

A. No; he did not; I am positive of that.

Q. Did he not make such representation to you before you wrote the note now placed in your hands, dated October 3, 1877, and marked "Exhibit No. 1, W. W. B.?"

A. No; it was long subsequent to that before anything of that kind was talked about.

Q. How long afterwards?

A. I think not before the spring following. That note would not have been a response to any such proposition.

Q. When Mr. Boarman first called to see you did he say
48 that you were responsible for the payment of the $2,000 note held by Miss Keller, and did he ask you to pay it?

A. No, sir.

Q. Did he ask you to pay the $2,000 note at any time before October 3, 1877?

A. I am not certain about that; my impression is that somewhere about that time Mr. Boarman wrote me a note in which it was intimated that drawing the rents from the property I should secure Miss Keller's note, and I rather interpreted his note as an endeavor on his part for Miss Keller to obtain from me a recognition of it. I am not positive about the contents of said note, but that is the impression which is still in my mind.

Q. You have stated in your testimony-in-chief that Mr. Boarman, at the first interview he had with you, stated to you that there was an incumbrance on the property to secure the $2,000 note held by Miss Keller. Is this statement correct?

A. I believe it is.

Q. Can you state positively when you first learned that the deed from Archie Thompson to you contained a provision that the grantee named in the deed was to assume the payment of the encumbrances on the property described in the deed?

A. I cannot. I think it was in the spring of 1878.

Q. Might it not have been in the fall or winter of 1877?

A. As I said before, I cannot be positive; but that is not my impression.

Q. If the knowledge of the provision in the deed that you were to assume the payment of the encumbrances on the property described in the deed first came to your knowledge or notice in the fall or winter of 1877, did you not then collect rents from the property after such knowledge or notice?

A. I collected the rents up to the time of the sale of the property, but I do not think that I came to the knowledge of the contents of the deed until the spring of 1878.

Q. You have stated in your examination-in-chief that at one interview with him you said to Mr. Boarman that you would convey the property to Miss Keller. What property do you mean; do you mean simply lot five, upon which Miss Keller held a deed of trust, or all the lots and houses conveyed to you by Archie Thompson?

A. I meant the lot upon which she had a deed of trust, I suppose.

Q. Did you ever exercise any acts of ownership or possession over any of the houses or lots described in the deed from Archie Thompson to you after you learned of the provision in the deed holding you liable for the encumbrances? I mean by acts of ownership or possession whether you collected rents or made conveyances in relation to the property.

49

A. I collected the rents in order to reimburse myself, having already notified both holders of deeds of trusts—at least the attorney on one side and Mr. Harkness on the other—that I could not keep the property, and that Mr. Harkness could sell or I would convey the property to Miss Keller at any time.

Q. What right had you to collect rents from Thompson's property except through the deed from him to you?

(Objected to by counsel for defendant.)

A. I don't know how to answer that question.

Q. You have stated that when you learned that the grantee in the deed from Thompson was to assume all the encumbrances on the four houses and lots in question you notified Mr. Harkness that you could not keep the property; did you notify Mr. Harkness before or after the sale under the $1,500 deed of trust held by him?

(Objected to by counsel for defendant, because the question assumes that the witness has stated that which he has not stated.)

A. I notified Mr. Harkness as soon as I learned that there was a second mortgage, not believing, however, at that time, or, indeed, at any time, that I was responsible for Miss Keller's note, and I think I notified Mr. Harkness, as above stated, when I paid the last instalment of interest, or soon after.

Adjourned at 5.45 p. m., until Thursday, January 19, 1882, at 2.15 p. m.

Met at 2.15 o'clock p. m., on Thursday, January 19, 1882, *at 2.15 o'clock p. m.*

Present: The defendant and counsel for the respective parties.

Whereupon the examination of the witness, FRANCIS A. ASHFORD, is proceeded with as follows:

By Mr. WASHINGTON:

Q. Did you convey by deed in fee simple to Thomas Duncan two of the houses and lots conveyed to you by Archie Thompson, namely, lots seven and eight in Kelly's subdivision in square 889?

A. I believe I did.

50 Q. Did you collect rents from either of these two houses up to the time of such conveyance by you?

A. I do not remember.

Q. When did you make the conveyance to Duncan?

A. I do not remember that, either.

Q. What was the monthly rental of each of the four houses from February, 1877, the time you commenced collecting rents, until you ceased to collect them?

A. The rental for house on lot five was $25.00 per month, and that was paid regularly. From one of the houses no rent was collected. I do not recollect its nominal rent, it being occupied previously and the party never having paid any rent, so far as I know, while in the house. I think the rental for each of the others was $25.00 per month, but it was paid irregularly, and probably some of it was not paid at all. I think I called once for the payment of the rent of the house for which I collected no rent.

Q. Did you lease any of these houses to tenants chosen by yourself?

A. I don't remember. I think if one became vacant I probably put it up for rent, but I have no memory of having done so. I should have done it had one become vacant.

Q. When you were informed by Mr. Boarman that there was a provision in the deed reciting that you had assumed the payment of all the incumbrances on the property conveyed to you by Archie Thompson, and were personally liable therefor, had you no desire to examine the deed to see if his statements were correct? Did you not see Mr. Kelly or consult with some other person about your liability, or about the contents of the deed?

A. Yes; I did take counsel of my brother, Mahlon Ashford, and he said he would look into the matter. I probably mentioned the statement made to me by Mr. Boarman to Mr. Kelly.

Q. Do you believe that the deed to you from Thompson at the

time you mentioned the matter to Mr. Kelly was in his possession or was under his control?

A. I don't know anything about it. The thought never occurred to me.

Q. What is your relation by marriage to Mr. Kelly?

A. I am his son-in-law.

Q. Did Mr. Kelly at any time convey to you by deed, or by any other instrument, any houses or lots?

A. Yes. I mean by this that I bought them, and paid $5,000 in cash.

Q. Did you ever hold any property conveyed to you by
51 Mr. Kelly upon any trust, express or implied?

(Objected to by counsel for the defendant as not pertinent and as irrelevant.)

A. No; I believe not.

Q. Have you ever been trustee in any deed made by Mr. Kelly?

(Same objection.)

A. Since the last question has been asked I remember of one instance where I was made trustee in a deed of trust to secure Judge Richardson a debt of Mr. Kelly.

Q. It appears that at the sale of lot five, in square 889, Mr. Harkness became the purchaser for $1,700.00, and you allege in your answer that this sum was not more than one half of its value. Is this statement true?

A. I believe it is, because I consider that an investment of $1,700, which would bring an annual rental of $300, would, in ordinary times, be a good investment to double the amount. That is the way I make my deduction as to its value.

Q. You state in your answer to the bill that a demand for the payment of the $2,000 note held by Miss Keller was made in the month of February, 1878. Is this statement correct?

A. I think so, so far as I can remember.

Q. Will you look at the postal card signed by you and dated October 29, 1877, addressed to Mr. Boarman, marked "Exhibit No. 2, W. W. B.," and state what it means?

A. About that time Mr. Boarman called on me relative to Miss Keller's note, and I told him that I recognized the hardship to Miss Keller as much as any one, and that I would endeavor to get Mr. Kelly to provide in some way so that she would be secured, urging, at the same time, that it would be best for her to take the property on which she had the deed of trust. I saw Mr. Kelly, told him of the circumstances, and he expressed sincere regret and promised to see, within a few days, what he could do to secure Miss Keller. In a few days thereafter he gave me two notes--I forget whether they were deed of trust notes or not—one of $1,500, the other of $800, stipulating that if she accepted the notes he might redeem when the lots upon which the notes were secured (now I remember that they were deed of trust notes) should be built upon. These I offered to Mr. Boarman, together with lot five and the

house on it, for Miss Keller, and urged him to accept it. He said he would consider the matter. I think he said he wanted to consult her, but I won't be sure about that, however. In a
52 few days thereafter he said that he declined the offer. I told him that these notes were represented to be good for the amounts, and that if I had the money and the titles proved good I think I should have considered it a very good investment. He then suggested that there would be no doubt about raising money upon my note if I would buy the notes. This suggestion of his I said I would think about; but upon reflection I did not wish to give any note that I might not be able to meet, and so informed him. The suggestion referred to in the postal card as coming from Mr. Boarman I thought at the time was merely bantering.

Q. In your deed to Thomas Duncan, dated December 4, 1877, you state that lots seven and eight, in square 889, are conveyed subject to existing encumbrances thereon; did you not then know or had you not reason to believe that encumbrances existed on said lots?

A. I had been informed that there was an encumbrance on each of $1,500.

Q. Are you aware of the fact that one of the four houses in question was sold by William A. Gordon, trustee?

A. I do not remember.

Q. There were four houses and lots conveyed to you; two were conveyed to Thomas Duncan by you, namely, lots seven and eight; lot five was sold to Harkness; and as to the remaining lot, nine, what became of it?

A. I think that was conveyed to Mrs. Gray. The circumstances in this conveyance were similar to those which prevailed in the conveyance to General Duncan. Mr. Kelly was greatly embarrassed, and both of these parties were losers by business transactions. Mr. Kelly stating the facts to me; I told him that if it would be of any advantage to him or to his creditors that I would be very glad to convey any or all of this property which he had deeded to me, whereupon he asked me to convey two houses and lots on "H" street, in square 889, to General Duncan, and one, in the same square, to Mrs. Gray. I did so accordingly.

Q. Did you collect any rents from the house sold to Mrs. Gray?

A. I believe I did not.

Q. Are you certain?

A. I have no memory of ever having collected any.

Q. May you not have collected rent from this house?

A. I have no memory of ever having collected any rent from that house?

53 Q. Did you, by yourself or your agent, ever ask for the payment of rent from that house?

A. I believe I did.

Q. It appears from the land records that William A. Gordon, as trustee, sold lot nine to Mercy M. Gray, December 24, 1877, and gave her a deed January 11, 1878, and recorded the same day in liber 874,

page 355. Are you not mistaken in saying that a conveyance was made by you to Mrs. Gray?

A. It is possible that I am as regards this lot, but I do remember conveying a lot to Mrs. Gray in fee about that time under the circumstances as above stated.

Q. You have stated that you received a letter from Mr. Boarman. Have you that letter in your possession?

A. I have not.

Q. Have you a copy of that letter or any memoranda of its contents made about or near the time it was received?

A. I have not.

Adjourned at 4.15 p. m. until Friday, January 20, 1882, at 2.15 o'clock p. m.

Met, 2.15 p. m., on Friday, January 20th, 1882, pursuant to adjournment.

Present: Counsel for all the parties; also the defendant.

Whereupon the examination of the witness, FRANCIS A. ASHFORD, is proceeded with as follows:

By Mr. WASHINGTON:

Q. Did you give the letter you received from Mr. Boarman to your counsel or did you give it or show it to any one?

A. Not that I remember.

Q. You stated in your answer that Archie Thompson well knew when he conveyed the houses to you that it was the intention to convey to you only the equity in the property without in any way making you personally liable for the debts secured on the property, and you also state that you so understood the effect and purpose of the conveyance when you assumed to collect the rents. Did you not then know, when you commenced collecting the rents, or at any time while the rents were being collected by you, that he had conveyed the property to you?

A. When I collected the rents at first I did not know who had conveyed the property, but after the information received
54 from Mr. Boarman I did know that the property had been conveyed by one Archie Thompson, and I think such information was received some time early in the spring of 1878.

Q. Did you collect any rents after you learned that the property had been conveyed to you by Archie Thompson?

A. As I have already stated, I collected the rent up to the time the property was sold. Between the time I received such knowledge from Mr. Boarman, as above stated, I must have collected the rent after such knowledge.

Q. When you were told by Mr. Boarman, in 1877, that there was a $2,000 deed of trust on lot five, and upon which the note held by Miss Keller was given, did you not make inquiries to learn if this statement was correct?

A. I did.

Q. Who made the demand upon you for the payment of the $2,000 note held by Miss Keller?

A. I do not think that any formal demand was made until considerable conversation had been held about the matter. Mr. Boarman, I think, made such demand, or at least endeavored to convince me that I was bound for this note. The time of such demand or informal demand was just before suit was talked of being entered, which, I think, was in the spring of 1878.

Q. When Mr. Boarman made a demand for the payment of the note and tried to convince you that you were personally liable did he not tell you that you were liable to pay it by virtue of the condition or recital in the deed from Archie Thompson to you by which the grantee was to assume the incumbrances on the property?

A. He told me that I was liable under the conditions of the deed, which he said he had examined. I ridiculed the idea of my responsibility for the utterances in a deed that I had never seen and the contents of which I had no knowledge up to that time, and especially as I had time and again declared to him the conditions under which I thought the property had been deeded to me, and that when he had first informed me of the existence of this second trust I had declared that if I had known of its existence I should never have accepted the property, and which I, at that time and repeatedly afterwards, had offered to surrender to Miss Keller.

Q. What property did you offer to surrender to Miss Keller? Did you offer to surrender simply lot five, with the building thereon, or did you offer to surrender all four of the houses and lots?

55

A. I offered to surrender the property upon which she had a mortgage or deed of trust, and at one time, at least, I offered in addition thereto, at the instance of Mr. Kelly, two notes secured by deed of trust, one of $1,500 and the other of $800. I do not believe that I did offer all four of the houses and lots, but at that time I think I should have been very willing, if it had ever occurred to me.

Q. Why did you, time and time again, declare to Mr. Boarman the conditions under which the property had been conveyed to you if he had not told you repeatedly of your personal liability to pay the $2,000 note held by Miss Keller?

A. It was not from any knowledge or belief that I was personally liable, but from the knowledge that there was a second trust upon the property, and also from a desire to do the best I could for the relief of Miss Keller.

Q. You state in your answer that when a demand for the payment of the $2,000 was made upon you, which was prior to the sale to Harkness, that you informed Mr. Boarman that you did not intend to hold the property. What do you mean by the word "property?" Do you mean simply lot five, with the house thereon, or do you mean all four of the houses and lots conveyed to you?

A. I think I meant all four, if they had not already been disposed of.

Q. Did Mr Boarman make more than one demand upon you for the payment of the note?

A. I do not remember.

Q. What is your impression?

A. At first the request was for interest alone; then some endeavors were made, after I had declined to pay interest, to get me, in some way, to secure Miss Keller's note, principally, I think, through using my influence with Mr. Kelly to that end, and which I endeavored to do, without at any time expressing any opinion that would indicate that I felt personally bound in the matter. My impression is that he did not make more than one demand, and I am not positive that there was ever any written demand.

Q. Did Mr. Boarman more than once, in any way, inform you that he considered you liable to pay the incumbrance created by the $2,000 deed of trust on lot five, by virtue of the provision contained in the deed from Thompson to you?

A. Casually, after he first spoke of the provisions of the deed. I think it was mentioned on several occasions.

56 Q. When you told Mr. Boarman that you did not intend to hold the property, as you have previously testified, did you tell him before or after your conveyance of lots 7 and 8 to Thomas Duncan?

A. My impression is that it was long before that. I think it was at least in September, 1877; possibly before that time.

Q. Why did you tell him that you would not hold the property unless you had been informed or believed that you were liable to pay the incumbrances; the mere existence of deeds of trust on the property could not in any way affect your liability, and you had paid no consideration to Thompson?

(Objected to by counsel for the defendant for argumentativeness.)

A. Because from the knowledge which I had obtained from him that a second mortgage or deed of trust existed upon this property of which I had no knowledge or information, and which knowledge had annoyed and worried me, and not knowing but that other deeds of trust might be brought to light, I had determined to get rid of the property even at a sacrifice.

Q. You have stated in your testimony and in your answer that lot five, with the house thereon, was, in your opinion, worth $3,400 at the time you proposed that Miss Keller should take it. You also state in your letter to Mr. Boarman, dated October 3, 1877 (Exhibit No. 1, W. W. B.), that it was against your interest for Miss Keller to take lot five in satisfaction of her debt, notwithstanding there was an antecedent deed of trust on it for $1,500. Were all the houses on lots five, seven, eight, and nine alike?

A. As I stated in my note to Mr. Boarman (Exhibit No. 1, W. W. B.), it seemed to be a better-finished house inside (I mean the house on lot five), but in external appearance they seemed to be the same. The reason I said, in my note to Mr. Boarman (Exhibit No. 1, W. W. B.), that my advice to Miss Keller to take the property would be against my interest, was because I had no knowledge and did not believe that I was personally responsible for Miss Keller's note, and because I had expended at that time more money on the property

than I had received as rent; consequently, the longer I held the property and collected the rents it was to my advantage.

Q. Were not the houses substantially alike?

A. I believe they were.

57 Q. Now, if these houses were alike in value and had the same rental, that would make the whole of them, according to your standard of value, about which you have testified, $13,600. The deeds of trust and encumbrances on these houses amounted to $9,400 or $9,500, as appears by the complainant's testimony. Would it not have been a sacrifice for you to give away or surrender your equity, as you call it, in these houses, especially if you had not assumed any personal liability to pay the encumbrances?

A. I was willing to make a sacrifice, both for the purpose of getting rid of the annoyance I had already experienced from the property, and, moreover, for the purpose of relieving Miss Keller or any other of Mr. Kelly's creditors.

Q. You aver in your answer that it was not in the intention of Thompson, when he executed the deed to you, that the grantee should pay the encumbrances. Now, Thompson had given notes for the amount of these encumbrances, for which he was personally liable. Do you mean to say in your answer that Thompson conveyed the property to you with the understanding that you were not to be held personally liable in any way for the encumbrances?

A. I have already stated that I never saw Thompson and had no understanding with him.

Redirect by Mr. EDMONSTON:

Q. What is and has been your habit about keeping and preserving letters?

A. I do not believe that I have preserved half a dozen letters in my whole life after they have been answered. My usual habit is to respond, then tear letters or notes and throw them in the waste basket.

Q. Have you, so far as you know, any letters or notes written to you by Mr. Boarman, and have you searched diligently for the same recently?

A. I have searched diligently and failed to find any. My counsel requested me to do so some time ago.

Q. Has the indebtedness from Mr. Kelly to you, on account of which the property was by him caused to be conveyed to you, been paid?

A. No; neither in whole nor in part.

Q. Was any particular sum agreed to be credited on that indebtedness by reason of the conveyance of the property, or was it

58 only to be what might actually be realized from the property that was to be credited on the indebtedness?

A. No particular sum was agreed upon, but it was stated that something might be realized toward liquidating the amount of his indebtedness.

F. A. ASHFORD.

Subscribed and sworn to before me this 20th day of January, A. D. 1882.

JOHN B. THOMPSON,
Examiner in Chancery.

(The defendant's counsel here offers in evidence the entire record in the case at law No. 18712, and craves leave to refer to the original at the hearing.)

Adjourned at 4.45 p. m., subject to notice.

Deposition in Rebuttal for the Complainant.

Met at the office of the examiner at 2 o'clock p. m. on Wednesday, February 15, 1862, pursuant to agreement of counsel.

Present: R. B. Washington and William W. Boarman, Esquires, for the complainant, and W. E. Edmonston, Esq., for the defendant.

Whereupon WILLIAM W. BOARMAN, being called in rebuttal, deposes and says as follows, to wit:

By Mr. WASHINGTON:

Q. Dr. Ashford states in his cross-examination that you did not tell him before he wrote the note dated October 3, 1877, and marked "Exhibit No. 1, W. W. B.," that in the deed from Archie Thompson to him conveying one of the houses in question there was a provision that the grantee should assume the payment of the incumbrances. Will you state whether this statement of Dr. Ashford is correct or not?

(Objected to by counsel for defendant on the ground that the witness has already testified as to the interview in question.)

A. I am sure that he is mistaken. I know positively that I am correct in my recollection of the whole matter in that particular.

Q. Please state some of your reasons, if you have any, for your answer to the last question.

59 (Objected to by counsel for defendant.)

A. One of my reasons for recollecting what I have just stated is that I know that my first interview with him in regard to the matter was prior to the date of the exhibit just mentioned, at which interview I made him acquainted with the clause in the deed just mentioned; another reason is that during the latter part of the month of September, 1877, I prepared a letter to Dr. Ashford, which bears date September 14, 1877, which contained, in quotation marks, the clause, mentioned in the deed from Thompson to him, making him liable for the incumbrances then resting on the property conveyed. I took a press copy of this letter. I never, however, mailed the letter to Dr. Ashford, and now have it in my possession. As already stated, this letter is an additional reason that I cannot be mistaken in regard to my informing him, prior to its date, of the contents of the deed in question.

(Answer excepted to by counsel for the defendant.)

Q. Will you look at the paper now shown you and marked by the examiner "Exhibit W. W. B. No. 3," and state what that paper is?

A. It is the press copy of the letter to which I have just alluded. In some portions of this press copy there are lead-pencil marks. They were made by me because the press copy in such places was indistinct. The words are the same as those in the original. The words at the head of the letter, "Washington, D. C.," and "18," before "77," and my card on the left-hand upper corner of the original letter are printed and did not take in the press copy.

EXHIBIT W. W. B. No. 3.

WASHINGTON, D. C., *September 14th*, 1877.

Francis A. Ashford, M. D.

DEAR DOCTOR: Upon carefully examining the deed in fee from Archie Thompson and wife to you, conveying lot 5, in square 889, I find this covenant made by you, in these words: "Subject to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part."

The incumbrances referred to are two deeds of trusts, one to secure Abner B. Kelly, Esq., $1,500, and the other to secure Moses Kelly, Esq., $2,000. The latter security and note are held by Miss Keller, having been endorsed to her by Mr. Moses Kelly, who originally borrowed the money from her.

60 At our first interview you promised to pay the interest on said note held by Miss Keller and soon arrange for the payment in full of the note. Relying on your promise, I remained satisfied that you would attend to the matter, and for the first time was informed by you to the contrary on Saturday (I think) last. You then informed me Mr. Kelly could not be seen, although I find him executing deeds and transacting business since.

Now, Doctor, Miss Keller does not wish the payment of the note now; she is willing to allow it to remain out for two or three years, provided interest to date is paid and good security is given. She does not regard the second mortgage on lot 5, square 889, sufficient, not knowing how much interest on the first note is unpaid and taxes besides. Being the owner of the property and having assumed the payment of the note for $2,000, if you will not do anything towards securing it further, then nothing is left for Miss Keller to do but to sell under the trust and hold you for the balance, should there be a deficiency after sale. As to your liability I think there is no doubt. I have carefully examined the law, and am more than satisfied that your assuming to pay incumbrances made you liable to pay them. I am sorry, Doctor, to be obliged to write to you as above, but I see no disposition on Mr. Kelly's part to settle, and I must say your promises considerably misled me, as I would over a month ago have gotten judgment against him, which would have been a lien on all the property he has lately conveyed. Please call to see —, as I desire to talk with you on the subject; also let me know to what time

interest on the first note has been paid and as to taxes and who is the holder of the note, and oblige,

Very respectfully, WM. W. BOARMAN,
Att'y for Miss Keller.

Q. Will you state at what date this press copy was taken by you?
A. Within a very short time—that is, on the same day on which the original was written.

(Complainant's counsel here offers in evidence and files with the examiner the press copy in question, to which offer counsel for defendant objects.)

The WITNESS, continuing: After I had made a press copy of the letter, on reading the original over, finding I had omitted the
61 word "have," near the bottom of the second page, I interlined it and then interlined in the press copy the same word in lead pencil.

Q. You have stated that you did not send the original letter, of which a press copy has been offered in evidence, to Dr. Ashford. Did you at or about that time send a letter to Dr. Ashford containing the substance of the letter in so far as it refers to the subject of the grantee assuming the payment of the encumbrances on lot 5, in square 889?

(Objected to by counsel for defendant, because the question is leading in form, because it is not in rebuttal.)

A. I do not distinctly recollect that I did; my impression, however, is that if I did not write I saw him in person; in either case the clause in question must have been referred to. The reason that I did not send the original letter was because it contained the following language: "You then informed me Mr. Kelly could not be seen, although I find him executing deeds and transacting business since." This I construed, upon reading over the letter, a reflection upon Dr. Ashford which I did not desire to make and unintentionally made in the letter.

(Answer objected to because it is not responsive to the question and because a part of it gives the impressions of the witness.)

Q. Dr. Ashford states in his cross-examination that he informed you that he did not intend to hold the "property," and that he "thinks he meant all four of the houses and lots if they had not already been disposed of." Did Dr. Ashford inform you that he did not intend to hold lots 7, 8, and 9, in square 889, with the houses thereon?

A. I do not remember that he ever gave me such information; my best memory is that he never did. I mean by my answer to say that he never, through me, offered to convey such property to Miss Keller. I mean, further, to say in my answer that in our early interviews he never offered to convey even lot 5, nor any of the other lots contained in the deed from Thompson to him.

Q. Did Dr. Ashford at any time prior to September 14, 1877, in-

form you that he did not intend to hold lots 7, 8, and 9, in square 889, or any or either of them?

A. He did not.

Q. Did you have any conversation with Dr. Ashford on or before September 14, 1877, about the lots and houses conveyed to him in the deed from Archie Thompson, except lot number five, in square 889?

62 A. I do not think that I did, and if I did it was simply stating what the deed conveyed to him. I had no right or reason to ask in regard to any other lots than lot five.

Q. When do the land records of the District show that the lots mentioned in the deed from Archie Thompson and wife to Dr. Ashford were sold or disposed of?

(Objected to because the objection calls for not the best evidence and is not in rebuttal.)

A. Lot 5 was conveyed to John C. Harkness March 15, 1878, by M. M. Rohrer, trustee. Lots 7 and 8 were conveyed by Francis A. Ashford and wife, by deed dated Dec. 4, 1877, to Thomas Duncan. Lot 9 was conveyed to Mercy M. Gray by William A. Gordon, trustee, by deed dated January 11, 1878

Q. Where does the defendant, Dr. Ashford, reside?

A. I think, at No. 1330 New York avenue northwest, in this city. I am informed and believe that he has lived here for the last 5 or 10 years, and perhaps all his life.

Q. Where does Moses Kelly reside?

A. On "E" St. between 5th and 6th, in this city.

Q. You have stated heretofore that you served a notice on Mr. Moses Kelly to produce before the examiner the original deed from Archie Thompson and wife to Dr. Ashford. Did Mr. Kelly make any response to that notice; if so, what was it?

A. He did. He brought me the deed of trust from Archie Thompson and wife to William A. Gordon, marked Exhibit H. C. K. No. 2.

Q. Did you ever call at Mr. Kelly's house in relation to the note held by Miss Keller; and, if so, who did you see there?

(Objected to.)

A. I did. I have called there frequently, and on one occasion met Dr. Ashford and Mr. Kelly in the parlor.

(The complainant's counsel here offers in evidence the *fieri facias* in the law case of Keller *vs.* Archie Thompson and Moses Kelley, No. 18712, and the return "*nulla bona*," dated April 15, 1878, made by the marshal thereon.)

Counsel for the defendant objects to the above offer unless the whole record of that suit is introduced.)

Cross-examination by Mr. EDMONSTON:

Q. When was Mr. Davidge employed in the matter of the collection of the note held by Miss Keller?

A. April 23, 1878, or about that time.

Q. When was it first determined that a suit in equity
63 should be brought by Miss Keller against Dr. Ashford for the purpose of collecting the note held by Miss Keller?

A. Not until after Dr. Ashford refused to pay the note, which was in the early part of the fall of 1877.

Q. How long after the refusal of Dr. Ashford to pay the note was it determined that a suit in equity should be brought?

A. I always thought he was responsible and still think so. If I had determined at any certain day between the time of his refusal to pay the note and the time the equity suit was actually begun to commence proceedings against him I would have sued in equity. As soon as Dr. Ashford refused to pay the note I concluded to sue him, and I never changed my intention to do so. It was a continuing determination culminating in the filing of the bill.

(Answer objected to.)

Q. After the employment of Mr. Davidge in the case was there not some uncertainty of opinion, both by you and Mr. Davidge, as to the proper form of the remedy which you supposed Miss Keller might have against Dr. Ashford?

(Question objected to by counsel for complainant as being irrelevant, impertinent, and out of the domain of proper legal inquiry, as the learned counsel ought to know.)

A. None at all. If there was any doubt it was in the books which we examined. When I went to see Mr. Davidge at first about this case and after I had explained the case he clearly thought that Dr. Ashford was responsible by reason of that clause in the deed. As to whether the suit should be brought in equity or at law that was a mere collateral matter. Neither of us ever doubted for a moment Dr. Ashford's liability. We did examine many authorities, and the bill was the result. As to whether I personally ever had any doubt whether the suit ought to be brought in equity or at law, I do not recollect that I seriously considered that question until the time came to commence proceedings.

Adjourned at 4.40 p. m., until Friday, February 17th, 1882, at 2 o'clock p. m.

Met Friday, February 17th, 1882, at 2 o'clock p. m., pursuant to adjournment.

Present: Counsel for all the parties and the witness, William W. Boarman.

64 Before proceeding with the cross-examination the witness states as follows:

Upon reading over my testimony in rebuttal, taken on Wednesday last, I find that one of my answers is a little obscure, and I desire to add that my letter to Dr. Ashford, which bears date September 14, 1877, but which, for the reasons I have already stated, was not mailed, was written by me on the 14th day of September, 1877, and that the press copy offered in evidence was taken by me on the same day. I desire to state, farther, that my best memory is that

Dr. Ashford never informed me that he did not intend to hold lots 7, 8, and 9, in square 889, or any or either of them. If he ever did I am certain he never did on or before September 14, 1877. I now produce the original letter from which the press copy above referred to was taken. The same is here filed with the examiner and marked "Exhibit W. W. B. No. 4."

"EXHIBIT W. W. B. No. 4."

WASHINGTON, D. C., *September 14th*, 1877.

Francis A. Ashford, M. D.

DEAR DOCTOR: Upon carefully examining the deed in fee from Archie Thompson and wife to you, conveying lot 5, in square 889, I find this covenant made by you in these words: "Subject to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part."

The encumbrances referred to are two deeds of trust, one to secure Abner B. Kelly, Esq., $1,500, and the other to secure Moses Kelly, Esq., $2,000. The latter security and note are held by Miss Keller, having been endorsed to her by Mr. Moses Kelly, who originally borrowed the money from her.

At our first interview you promised to pay the interest on said note held by Miss Keller and soon arrange for the payment in full of the note. Relying on your promise, I remained satisfied that you would attend to the matter, and for the first time was informed by you to the contrary on Saturday (I think) last. You then informed me Mr. Kelly could not be seen, although I find him executing deeds and transacting business since.

65 Now, Doctor, Miss Keller does not wish the payment of the note now; she is willing to allow it to remain out for two or three years, provided interest to date is paid and good security is given. She does not regard the 2d mortgage on lot 5, square 889, sufficient, not knowing how much interest on the first note is unpaid and taxes besides. Being the owner of the property and having assumed the payment of the note for $2,000, if you will not do anything towards securing it further, then nothing is left for Miss Keller to do but to sell under the trust and hold you for the balance should there be a deficiency after the sale. As to your liability I think there is no doubt. I have carefully examined the law and am more than satisfied that your assuming to pay encumbrances made you liable to pay them.

I am sorry, Doctor, to be obliged to write to you as above, but I see no disposition on Mr. Kelly's part to settle, and I must say your promises considerably misled me, as I would over a month ago have gotten judgment against him, which would have been a lien on all the property he has lately conveyed. Please call to see —, as I desire to talk with you on the subject; also let me know to what time interest on the first note has been paid and as to taxes and who is the holder of the note, and oblige,

Very respectfully,

WM. W. BOARMAN,
Att'y for Miss Keller.

To the filing of which exhibit the counsel for the defendant objects as evidence for the complainant.

Cross-examination resumed by Mr. EDMONSTON:

Q. When the time came, in your judgment, to commence proceedings against Dr. Ashford did you have any doubt as to the proper form of remedy?

(Question objected to, as it is designed to elicit an opinion and not a fact which is relevant.)

A. I may have had, but after consultation with authorities what little doubt I had was lessened. I never doubted Dr. Ashford's liability, by reason of that clause in the deed, in some form of action.

Q. Was it not a matter of serious consideration with you whether you should bring the proceeding at law or in equity?

A. As already stated, I had but little doubt in which forum to sue, and I don't know that I ever entertained any serious doubt on the question.

66 Q. Did you not give considerable time to the examination of authorities before determining whether the proceeding should be brought at law or in equity?

A. If I did it was rather for the satisfaction of being strengthened by authorities in my opinion on the subject than to clear away any well-grounded doubt in the matter. Of course I looked at several authorities and did spend some time in their perusal.

Q. If Dr. Ashford had promised you, as the agent and representative of Miss Keller, to pay the note, as you have alleged in your testimony, what legal obstacle was there to bringing and sustaining an action at law against Dr. Ashford?

(Objected to by counsel for complainant, because the witness has not alleged in his testimony that Dr. Ashford promised him "as the agent and representative.")

A. After Dr. Ashford refused to pay the note means to compel him to do so naturally suggested themselves to me, and without any examination of authority on the subject I entertained the opinion that Miss Keller's remedy against him was in equity, the prevailing reason for such opinion being that the deed containing the clause making him liable was not signed by him.

Q. Did you understand that she could not bring and sustain an action at law against Dr. Ashford?

A. As already stated, how or in what court to bring suit was a mere collateral matter until shortly before filing of the bill. I was not absolutely certain that she could not, but I was more sure that she could in equity.

Q. Did Dr. Ashford's name appear upon any of the papers sent to you by Miss Keller with the note, or did his name appear upon the note?

A. She never sent any papers to me other than the $2,000 note, and his name was not on that.

Q. After receiving the note, and before communicating in any

way with Dr. Ashford, did you apply to Archie Thompson or Moses Kelly to have them, or either of them, pay the note?

A. I did not.

Q. Did you apply to Thompson or to Kelly to have either of them pay the note before bringing the action at law against them?

A. Very likely I did. My best recollection is that I did. I am certain that I did call on Mr. Kelly.

Q. Did you call on Thompson?

A. I can't answer any better than I have. I went out there,
67 I know, but whether I asked him to pay the note is a question. It is, however, likely that I did.

Q. Have you any recollection of having seen Thompson before bringing the action at law?

A. It is very probable that I saw him before; this is the best I can state.

Q. Did you see Thompson after the action at law was brought?

A. I may have seen him; I think he called to see me, and perhaps at my written request to do so; I think he came in my office to see me.

Q. Was that after the action was brought?

A. I cannot state; it may have been before, and more than likely was before.

Q. Why do you infer that it was likely before?

A. Because I could have no reason in the wide world to see him after I got judgment against him; I was then pretty sure of his inability to pay the note, and my leading reason for seeing him before suit was to get the money on the note.

Q. Did you write to him or to Kelly about the note?

A. I do not distinctly recollect that I did write to Thompson; I may, however, have done so, as he lived a long way off; I do not recollect of writing to Mr. Kelly.

Q. Had you written to either of them, would you have taken a press copy of the letter?

A. I think not.

Q. Was it your habit at the time to take press copies of letters written upon such matters as a demand of payment of a note?

A. No, sir; and it never has been since; I do not think I ever took over forty press copies in my life.

Q. Does the press book which you have just examined include letters written between the period of your receipt of the note of Miss Keller and 1878?

A. It does not.

Q. Then "Exhibit W. W. B. No. 3" is not taken from your letter press book or any one now in your possession?

A. I never had but one, and that is the one just mentioned, and it is not taken from that. My recollection is that the paper on which the press copy is taken came from a book owned by N. F. Cleary, who at that time had an office in common with me.

Q. I understood from your testimony that you had examined some of the land records relating to the property known as lot five,

in square 889, prior to seeing Dr. Ashford about the note in controversy. Can you state what deeds you then looked at?

A. After the note was handed to me for collection, or rather
68 just before it was given to me, Miss Keller informed me that the note was secured by a deed of trust. I at once consulted the records to find that trust, and to discover whether the property described in it was security for the note. I looked to see if it was the first trust, and found that it was not. I then examined the title to the lot mentioned in the deed of trust, and found the deed to Dr. Ashford.

Q. In order to ascertain whether the trust securing the note in suit was the first trust you would have to examine the records prior to the date of said trust, would you not?

A. I would have to examine the records prior to the date of the second trust, of course.

Q. You found the deed of trust to Rohrer which was on lot five, did you not?

A. I found the record of it.

Q. For what purpose or reason did you at that time examine the record subsequent to the date of the trust securing the Keller note?

A. I cannot state; but this I will state, that I found the deed to Dr. Ashford, and acted on the information it gave me as to his liability.

Q. I suppose you looked at that deed only casually in order to ascertain its date, names of the parties to it, and the property conveyed; is that so?

A. You are mistaken. Every deed that I found touching the property in question I examined critically.

Q. Then why, in your letter of September 14th, do you state as follows: "Upon carefully examining the deed in fee from Archie Thompson and wife to you, conveying lot 5, in square 889, I find this covenant made by you in these words?"

A. I do not know that there is anything in this statement which shows that I did not carefully examine them in the record office.

Q. You examined only the record, and not the original deeds?

A. Only the records.

Q. How many interviews with Ashford had you had before you wrote the letter of September 14th, which you did not send?

A I cannot state the exact number. I certainly called to see him several times at his office, and had interviews with him at chance meetings.

Q. Did you look at the records more than once prior to September 14th, 1877, with reference to this matter?

A. I made the search that I have already referred to, and took down the clause in question.

Q. How often did you examine the record of the deed to
69 Ashford prior to September 14th?

A. I am sure that I found it prior to that date, but I do not know whether it required one or more searches. When I found it I made a note of it and wrote down the clause that I found in it.

Q. Are you positive that on the same day you first examined the record of the trust securing Miss Keller's note you also critically examined the record of the deed from Thompson to Ashford?

A. I cannot state that. It may have been the day following or within a short time. As I have already stated, it may have required one or more searches to complete what I was examining.

Q. Have you anything to show when you first had any communication, verbal or written, with Dr. Ashford after September 14th, 1877?

A. There is nothing in my possession that I have succeeded in finding in the way of a copy of a letter or a memorandum made or written by me after September 14, 1877.

Q. I understand the penciling at the top of Exhibit W. W. B. No. 3 was made on September 14th, 1877; were the pencil marks in the body of the press copy made at the same time?

A. I think they were made before the penciling at the top was made. They were both made on the same day, however. They were simply made to bring out what was indistinct in the press copy, so as to make it legible.

Q. Had you prepared the original for mailing before making the pencil marks at the top of "Exhibit W. W. B. No. 3?"

A. I think I put the original in an envelope, and, intending to mail it that day, marked the press copy "Mailed Sept. 14, '77, B." This letter, I again say, I never sent.

Q. You have kept the original and the press copy together since that day?

A. They have been in my office and never out of my possession.

Q. Did you ever approach Archie Thompson and endeavor to get him to bring a suit against Dr. Ashford based upon the clause in the deed which is quoted in your letter of September 14th, 1877 (Exhibit W. W. B. No. 3); if so, was it after September 14th, 1877?

A. I do not remember anything on that subject.

Q. Can't you remember that something to that effect occurred between you and Thompson?

A. I cannot remember anything of the kind. I know I saw him twice or more, but my memory is too shadowy to state or say
70 what occurred between us. I do not, however, recollect the subject-matter of your inquiry.

Adjourned at 4.45 p. m., until Saturday, February 18th, 1882, at 1 o'clock p. m.

Met at 1 o'clock p. m., on Saturday, February 18th, 1882.

Present: Counsel for all the parties, and the witness, WILLIAM W. BOARMAN. Whereupon his examination is resumed as follows:

By Mr. EDMONSTON:

Q. Were you present when Archie Thompson gave his testimony in this case?

A. Yes; I was.

Q. Did you hear him testify that you approached him about having him enter suit against Dr. Ashford?

A. I heard him testify to that effect.

Q. Didn't you at that time state, in the presence of Thompson and of myself, that you did approach Thompson for that purpose, or do you remember about that?

A. I do not remember having made any such remark, although I am not willing to deny that I did; and I wish, in this connection, to state that since my testimony of yesterday I have exercised my memory to its utmost, and the conclusion to which it has led me is that I did see Archie Thompson for that purpose, but my memory is not distinct and clear, but nebulous. I am, however, more certain that I did than that I did not. I intended to make this statement during my testimony to-day, and before any reference was made by Mr. Edmonston to the subject.

Redirect by Mr. WASHINGTON:

Q. You have just stated that it is your impression that you spoke to Archie Thompson about his bringing a suit against Dr. Ashford. If you conversed with Thompson on this subject, about what time did the conversation occur?

A. I cannot state precisely. I do not know that I can make any definite statement as to the time.

71 Q. You have stated on cross-examination that you made a search of the land records, and took down the clause in the deed from Archie Thompson to Ashford referring to Ashford's liability. Did you take down this clause in the deed before or after your first interview with Dr. Ashford about the note held by Miss Keller?

A. I took it down before and showed him a paper containing that clause at our first interview. I read it over to him in his office.

Q. You have stated on cross-examination that the press copy ("Exhibit W. W. B. No. 3") is not taken from your letter press book, and that your recollection is that the paper on which the press copy is taken is from a book then owned by N. F. Cleary, who at that time had an office in common with you. Have you among the papers in your office other press copies taken by you in the year 1877 on similar detached sheets of paper, and in reference to matters not connected with this case?

A. Yes, sir; I have seven or eight. I do not know that they are all during that year, however. Upon examining them I find that they were all taken during that year and are all apparently torn from the same press-copy book.

(The complainant's counsel here offers in evidence one of said copies marked "Exhibit W. W. B. No. 5," and dated Aug. 8th, 1877.)

EXHIBIT W. W. B. No. 5.

Original mailed Aug't 8th, '77, enclosing check for $31.50.

WASHINGTON, *Aug't 8th*, 1877.

Messrs. Riggs & Co., receivers.

GENTLEMEN: Please find enclosed my check for $31,50, rent in full for my share of rent due for room 4, Webster building, for May, June, and July, 1877.

Statement.

Mr. Fant on the 1st of May reduced our rent to $25 per month—3 months each		$75 00
My half	$37 50	
Rec'd order on me by Mr. Fant for repairs to room, to be deducted from rent	6 00	
Am't of check	$31 50	

Enclosed herewith copy of said order.

I have removed from room 4, and am now occupying,
72 under agreement with Mr. Fant, the room first on the right of the main entrance to the Webster Law Building.

Very respectfully, WM. W. BOARMAN.

Q. Were you a partner of N. F. Cleary?

A. I never was nor was I in any manner connected with him in any business whatever as partners. We once appeared as joint counsel in a murder case, and also in a case in equity against some man named Brown, brought by the Ocean National Bank of New York. We simply rented offices and paid for them, each for his own half, neither being responsible for the entire rent.

Q. You have heretofore stated that upon one occasion you proposed that Dr. Ashford should pay off the first mortgage on lot 5, in square 889, and that for this purpose and with his knowledge you attempted to make arrangements with Mr. Harkness, who held the note secured by the first mortgage; that this plan fell through by reason of Mr. Harkness' unwillingness to allow the payment of the note he held to be anticipated. Do you find among the papers in your office any notes or letters from Mr. Harkness and Dr. Ashford relating to the subject? If so, produce them, describe them, and file them with the examiner.

(Mr. Edmonston objects to the evidence called for by the question as not being in rebuttal.)

A. I find a letter to me from John C. Harkness, trustee, dated Sept. 29, 1877, acknowledging the receipt of a letter from me to him of the 28th of that month, and informing me that he held a note, described in my letter, as trustee for Gadsby estate, and secured by deed of trust, stated by me in my letter; and also informing me that there was due thereon, in August, $150.00. I also find a postal

card from John C. Harkness to Dr. F. A. Ashford bearing post-mark Oct. 4, which was enclosed to me by Dr. Ashford in one of his envelopes containing his card on the upper corner. This postal card refers to Mr. Harkness' answer to me. It also states Ashford's correctness in his statement as to "lot 5," and requests him to let me know of the writer's misapprehension. It also states that his answer to me related to lot 4 instead of lot 5. I also find a letter from John C. Harkness, trustee, to me acknowledging my letter of the "9th inst.," which he says was delayed by being erroneously di-
73 rected, and stating that it would be injudicious for him, as trustee, having made a safe investment, to terminate the loan before the time expired.

(The complainant's counsel here offers in evidence the three papers referred to by the witness in his answer, and the same are now filed with the examiner and marked, respectively, Exhibit W. W. B. No. 6, Exhibit W. W. B. No. 7, and Exhibit W. W. B. No. 8.)

EXHIBIT W. W. B. No. 6.

WASHINGTON CITY, *Sept.* 29, 1877.

W. W. Boarman, Esq.

DEAR SIR: Yours of the 28th instant has been duly received.

I am the holder of the described note, as trustee for Gadsby estate, secured by deed of trust, as stated by you. There was due August last on said note one hundred and fifty ($150) dollars.

Yours respectfully,

JOHN C. HARKNESS, *Trustee.*

EXHIBIT W. W. B. No. 7.

Dr. F. A. Ashford, No. 1330 N. Y. Ave., Washington, D. C.

DEAR SIR: My answer to W. W. B. related, as I understood it, to lot 4 instead of lot 5. You are correct in your statement as to the latter number. You will confer a favor by letting W. W. B. know of my misapprehension.

Yours, &c., JOHN C. HARKNESS.

EXHIBIT W. W. B. No. 8.

Wm. W. Boarman, Esq.

DEAR SIR: Yours of the 9th inst. was delayed by being delivered, per direction, at 1220 H St. instead of 916 New York Ave.

It would be injudicious for the trustee, having made a safe investment and at better rate of interest than can now be obtained, to terminate the loan before the time expires.

You will see, as I am acting for other persons and not
74 myself, that I cannot accept of the proposition you present.

Yours respectfully,

JOHN C. HARKNESS, *Trustee.*

Q. Were all these exhibits received by you in the year 1877?

A. They were. Exhibit W. W. B. No. 8 was received by me October 16, 1877.

Mr. EDMONSTON, for the defendant, objects to the evidence of the contents of the three exhibits last filed, and objects to the filing of said exhibits as evidence in rebuttal.

Recross-examination by Mr. EDMONSTON:

Q. When did you last read over your examination-in-chief in this case, or that part of it referring to your first interview with Ashford?

A. Shortly after it was taken.

Q. You stated there that you told Ashford about the clause in the deed; how is it that you now remember that you read over the clause in question to Dr. Ashford?

A. My object was when I first him to make him acquainted with that clause, and I supposed the language used in my examination-in-chief was sufficient for that purpose. I remembered, when I used that language, that I, at the interview mentioned, had a piece of paper containing the clause, and intended so to state. If I did not, it was forgetfulness. I thought the examiner had had so written it down.

Adjourned at 2.30 p. m. until Monday, February 20th, 1882, at 3.30 p. m.

Met 3.30 p. m. Monday, February 20, 1882, pursuant to adjournment.

Present: The counsel for all the parties, and the witness, William W. Boarman.

The WITNESS: I desire to state further, in my answer to the last question, that the fact is that at my first interview with Dr. Ash-
75 ford I not only told him of the clause in the deed in question—I mean the deed from Thompson to him—but I showed him the clause written on a piece of paper. I called to see him by reason of that clause, as I believed his liability to pay the Keller note under it; and I know that I then made him fully aware of the clause in question. It was that clause that prompted me to go to see him, inasmuch as I considered that he had by it assumed payment of the Keller note. I remembered what I have above testified to at the time mentioned in the last question, and have stated several times during my testimony that I remembered having read the clause to Dr. Ashford from a piece of paper I had with — at our first interview.

By Mr. EDMONSTON:

Q. What you have stated above, this afternoon, has been stated by you with the assistance of memoranda made by you since the last session, and after consulting with counsel as to the testimony heretofore given, has it not?

A. The question has not been answered by me with reference to

any memoranda of the occurrence; what I have stated, in order to be precise and accurate, I first wrote down a minute or two before the examiner wrote as I testified above, and I referred to what I had written down in giving my testimony. I never consulted with any one who advised me what I have said. I consulted with myself and my memory, and I have been in no wise influenced by any one connected as counsel or otherwise with this cause; it is true that I read part of the testimony over with Mr. Washington, and my testimony to-day is the result of what I think ought to be stated in fairness to myself and all others connected with this cause.

Q. If the deed from Thompson to Ashford, which you found on record, had contained no clause about the grantee assuming the payment of incumbrances, do you mean to say that, knowing that the property had been conveyed to Dr. Ashford, you would not have seen him about the payment of the note held by Miss Keller?

A. I more than likely would have done so before advertising the property for sale under the second trust. I do not think I would have been obliged to have seen him under such circumstances, as he would have then been simply grantee of the equity of redemption, and in my opinion not personally liable for the payment of the note.

76 Redirect examination by Mr. WASHINGTON:

Q. You state in your testimony that you found among your papers a postal card from John C. Harkness to Dr. Ashford, post-marked Oct. 4th, which was enclosed to you by Dr. Ashford in one of his envelopes containing his card in the upper corner; will you look at the envelope now shown you, and marked by the examiner "Exhibit W. W. B. No. 9," and state whether that is the envelope in question?

(Said paper is here marked by the examiner "Exhibit W. W. B. No. 9.")

"EXHIBIT W. W. B. No. 9."

F. A. ASHFORD, M. D.,
1330 New York avenue,
Washington, D. C.

Mr. BOARMAN,
Att.-at-Law,
505 D St. N. W., City.

(Objected to by counsel for the defendant as being out of the order of proof.)

A. I have no doubt but that it is.

Q. Did you have any conversations with Dr. Ashford after the 14th of September, 1877, about the payment or settlement of this note?

(Objected to by counsel for defendant for reason just above stated.)

A. Yes, sir. The conversations did not cease at that date, and I

don't remember exactly when they did, but it was some time after that.

Q. Why did you enter into any negotiation or correspondence with Mr. Harkness in relation to taking up the $1,500 note held by him?

(Objected to by def't.)

A. I suggested this course as a means of securing the Keller note. I suggested it to Dr. Ashford, and told him that I would make inquiries in regard to it, and he made no objection to my doing so. I don't recollect the exact language and exact words which were used by us on that occasion, but I do recollect distinctly that Dr. Ashford, about that time, was willing to do anything to settle that note, and to that end saw Mr. Kelly, as he informed me, and met me at Mr. Kelly's house for that purpose; and further, the two notes that he speaks of in his testimony as having been offered by him to me as security for the Keller note, he informed me, he got from Mr. Kelly.

77 Q. Was the reference to lot 5, in square 889, on the note at the time it was placed in your hands for collection?

A. Yes, sir; it was.

Q. Would you have made any demand upon Dr. Ashford for the payment of the note had you not known that he had assumed its payment by virtue of the clause in question?

(Objected to by counsel for the defendant.)

A. If I knew at the time that he was the owner merely of the equity of redemption, and the deed to him contained no such clause as you have described, I may even then have called upon him and told him that I held the note for collection and that if the same were not paid I would sell the property securing it; but knowing as I did then know of the clause that you have mentioned, I thought him to be in the same plight as if the note was his own.

By Mr. EDMONSTON:

Q. Why is it that you have no doubt that "Exhibit W. W. B. No. 9" enclosed "Exhibit W. W. B. No. 7?"

A. In the first place I remember the fact distinctly, just as distinctly as if it had occurred yesterday, of my receiving the postal card in question in the manner that I have mentioned. I at the time thought it singular upon opening the envelope to find a postal card in it, but upon reading the card saw that it was not from Dr. Ashford, but that it requested him to inform me of the misapprehension of the writer, and that instead of doing so otherwise, he had forwarded the postal card to me. Besides, I do not remember of ever having received but two envelopes from Dr. Ashford, one enclosing Exhibit W. W. B. No. 1, which I have, and the other enclosing the postal card just referred to. These are my reasons for remembering the circumstance.

Q. Have you the letter or other written communication from John C. Harkness to yourself, which is mentioned or referred to in "Exhibit W. W. B. No. 7;" if so, please produce it.

A. The letters already placed in evidence by me are the only letters I can find written by him to me.

Q. When did Dr. Ashford meet you at Kelly's house as stated on page 34?

A. I cannot state the time exactly, but I think it was early in the fall of 1877.

Q. Was it after you received the letters from Harkness?

A. I cannot state. I do recollect that Mr. Kelly had been sick and that he was then convalescent, and I think that Dr. Ashford was then attending him.

78 Q. Did you meet there by appointment with Dr. Ashford or did you casually meet him?

A. I do not distinctly recollect now, but my impression is that it was by appointment with Dr. Ashford, and all three of us were together for some time in regard to this matter in Mr. Kelly's front parlor. I do not remember now exactly what occurred, but I do remember that the result of the interview looked to the securing at an early day of this matter. I mean the Keller note.

Q. When did your interviews with Kelly about the payment of this note or the judgment obtained on it cease, if you ever had such interviews?

(Objected to by counsel for complainant because no evidence has been offered to show that the witness had interviews with Mr. Kelly after the judgment was obtained against him on the Keller note.)

A. I have called upon Mr. Kelly several times and conversed with him in regard to this matter, and he has promised, time and time again, to pay the judgment. I am not certain that I saw Mr. Kelly before the suit was commenced on the note. I may, however, have done so before commencing the suit against him. I called on Mr. Kelly because he was Dr. Ashford's father-in-law, and because for that reason he might be induced to settle the matter for the relief of his son-in-law. As I have already stated I called to see him when Dr. Ashford was present, and at that time, as I do now, I considered Dr. Ashford liable for the payment of the note by reason of his having assumed it by the deed, and Mr. Kelly liable because his name was on the note. I believe that the interview, when Dr. Ashford was present, was prior to the time of the commencement of the suit at law on the note. It may, however, have been a short time afterwards.

WM. W. BOARMAN.

Subscribed and sworn to before me this 27th day of February, A. D. 1882.

JOHN B. THOMPSON,
Examiner in Chancery.

Adjourned at 6 o'clock p. m.

79 *Defendant's Deposition in Rebuttal. Filed and published Mar. 9, 1882. R. J. Meigs, Clerk.*

Met at the office of Messrs. Appleby & Edmonston, on Tuesday, March 7th, 1882, at 2.15 o'clock p. m., pursuant to notice.

Present: Messrs. Appleby & Edmonston for the defendant, and —— —— for the complainant.

Whereupon, FRANCIS A. ASHFORD, a witness of lawful age, produced and sworn on behalf of the defendant, deposes and says as follows:

By Mr. APPLEBY:

(The witness having been recalled in rebuttal:)

Q. Doctor, have you read or heard read the testimony of Mr. Boarman, given since you testified in this case; if so, please state whether or not there is anything therein contained which causes you to vary your testimony as heretofore given?

A. I have heard the testimony of Mr. Boarman read, and I do not know of anything stated in his testimony that would lead me to vary from the testimony I have already given; but, on the contrary, I am still more confirmed in the statements already made.

Q. Statements made by whom?

A. By myself.

Q. On page 25 of Mr. Boarman's testimony in rebuttal, he states that he showed you a paper containing the clause in Archie Thompson's deed to you respecting the assumption of the encumbrances, at his first interview with you, and that he read it over to you in your office. Please state whether or not that is correct?

A. I know that it is not correct.

Q. Is your memory very distinct with reference to the time when you were first made acquainted with the clause in question?

(Objected to by counsel for the complainant because the witness has heretofore stated on his cross-examination, at page 18, that he cannot state positively when he first learned that the deed from Archie Thompson to him contained a provision that the grantee named in the deed was to assume the payment of the encumbrances on the property described in the deed; and because this is an effort on the part of counsel to reopen a question of fact about which the witness has been fully, cautiously, and critically examined and re-examined by both parties.)

A. I cannot state positively the time, but I know it was very little time before Mr. Boarman talked of bringing suit; and, more-
80 over, that I well remember that Mr. Boarman read to me a clause which he said he had copied from the deed (and which was the first and only time he read such clause to me) in his own office, and that he at the same time read notes of some authorities which he said he had examined tending to show, as he claimed, that I was responsible for the payment of the note of Miss Keller, and at

the same time he referred to at least one authority which he read to me, but which I claimed was not an analogous case. I know it was not at our first interview, or even second, because I know that for a long time no reference was ever made to that clause.

Q. Can you state about how long it was before May 13, 1878, the time of bringing this suit, that Mr. Boarman read you this clause?

(Objected to by counsel for compl't.)

A. I cannot state exactly, but I am sure it was in the spring of 1878, because I remember that it was a warm day and that we stood talking some time on the sidewalk near his office, and that he then invited me to go in his office, stating that he would read an exact copy from the deed, and that he would show me some authorities which he said he had looked up. It does not appear to me now as if but a short time elapsed after that interview before suit was brought.

Q. Did you ever promise Mr. Boarman that you would pay the Keller note in question, or did you ever express yourself willing to pay the same?

A. I never did; but, on the contrary, at each and every interview I refused to acknowledge it or any responsibility in the matter when any responsibility was referred to, and the question of responsibility for the payment of the note had never been broached until just before suit was brought. I never believed there was any responsibility.

Cross-examination by Mr. WASHINGTON:

Q. Will you look at Exhibit W. W. B. No. 7, attached to Mr. Boarman's testimony in rebuttal, and tell me whether you received that postal from Mr. Harkness and enclosed it in an envelope to Mr. Boarman?

A. Yes; I received that postal card from Mr. Harkness, and I think I enclosed it immediately to Mr. Boarman.

F. A. ASHFORD.

Sworn to and subscribed before me this 7th day of March, A. D. 1882.

JOHN B. THOMPSON,
Ex'r in Chancery.

81 (Filed May 9, 1882.)

In the Supreme Court of the District of Columbia.

HENRIETTA KELLER
vs.
FRANCIS A. ASHFORD. } In Equity. No. 6243.

The above-entitled cause coming on to be heard at the last term of the court and being argued by counsel and considered by the court—

It is thereupon, this ninth day of May, 1882, ordered, adjudged,

and decreed that the bill of complaint filed in the cause be, and the same is hereby, dismissed, with costs.

A. B. HAGNER,
Asso. Justice.

Order for Entry of Appeal.

Supreme Court District of Columbia. Order Book 8, May 12, 1882.

The clerk will please enter an appeal on behalf of the complainant to the general term from the decree rendered therein by the special term on the 9th day of May, A. D. 1882, dismissing bill with costs.

W. D. DAVIDGE AND
WM. W. BOARMAN,
For Complainant.

Appeal as ordered entered by the clerk.
'82, 5, 12.

82 *Undertaking in Appeal. Filed May* 20, 1882.

In the Supreme Court of the District of Columbia, the 18 day of May, 1882.

HENRIETTA C. KELLER, Plaintiff,
vs.
FRANCIS A. ASHFORD, Defendant. } No. 6243.

The complainant having appealed to the general term from the decree pronounced herein on the ninth day of May, A. D. 1882, said Henrietta C. Keller and Sylvester B. Boarman, her surety, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to pay the cost of said appeal that may be adjudged against the said complainant.

HENRIETTA C. KELLER, *Principal.* [SEAL.]
S. B. BOARMAN, *Surety.*

Approved:
W. S. COX, *Justice.*

83 *Defendant's Death Suggested.*

In the Supreme Court of the District of Columbia. In General Term.

HENRIETTA C. KELLER
vs.
F. A. ASHFORD. } 6243. Eq. Doc. 18.

TUESDAY, *Nov.* 6, 1883.

Mr. Edmonston, of counsel for the defendant, suggests the defendant's death, and thereupon the cause which is No. 17 on the hearing calendar of the present term is continued by order of the court.

84 *Notice by Appellant of Motion for Appearance of Representative of Deceased Appellee. Filed Jan. 2, 1884. R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia. In General Term.

KELLER
v.
ASHFORD. } No. 17.

Please take notice that the appellant through her counsel will move the court on Wednesday next, at the opening of said court or as soon thereafter as counsel may be heard, for an order requiring the representative of the realty & personalty of the deceased appellee to appear as defendant appellee in his place and stead on or before the first ten days of the next answering term of the said court.

WM. W. BOARMAN,
W. D. DAVIDGE,
For Appellant.

Dec. 31, '83.

To Messrs. Appleby & Edmonston.

This notice served on us this 31st day of December, 1883.

APPLEBY & EDMONSTON,
G. F. APPLEBY,
Former Solicitors on the Record for F. A. Ashford.

85 *Petition of Appellant for Appearance of I. W. Ashford, as Defendant, Appellee. Filed Jan. 2, 1884. R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

HENRIETTA KELLER
vs.
FRANCIS A. ASHFORD. } No. 17.

To the honorable the supreme court of the District of Columbia, sitting in general term:

The petition of Henrietta Keller shows that the death of the appellee in the above-entitled cause was suggested to this court on the 6th day of November last and the cause continued to the next term.

Your petitioner further shows that Isabella W. Ashford is the representative of the realty and personalty of the deceased party, being his devisee and executrix, but that, notwithstanding such suggestion, no voluntary appearance has been entered by such representative.

Your petitioner therefore moves the court that an order may be passed that the said Isabella W. Ashford appear in the said cause as defendant therein in the place of the said deceased, and that
86 on failure to so appear within the first ten days of the next term the said cause will be heard and the decree therein be reversed if erroneous.

HENRIETTA C. KELLER.

Order for Appearance of I. W. Ashford. Filed Jan. 2, 1884. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia. In General Term.

KELLER
vs.
ASHFORD } No. 17. 6243 Equity.

It appearing to the court that the death of the appellee in the above-entitled cause has been suggested to the court, and that Isabella W. Ashford is the representative of the realty and personalty of the said deceased, upon consideration of the premises and the petition of the appellant, ordered, this 2d day of January, A. D. 1884, on motion of W. D. Davidge, Esq., and Wm. W. Boarman, Esq., that Isabella W. Ashford cause her appearance to be entered as defendant in said cause in the place of the said deceased within the first ten days of the next ensuing term, and, upon her failure so to do, that said cause will be heard and the decree therein reversed, if
87 erroneous, or, if not found, then that a copy be served upon the said Isabella W. Ashford, provided a copy of the above order be printed in some newspaper published at the city of Washington, D. C., once a week for three successive weeks before the beginning of the next ensuing term of the court in general term.

By this court.

D. K. CARTTER,
Chief Justice.

Petition of I. W. Ashford for Leave to Appear. Filed Feb. 5, 1884. R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia. In General Term.

KELLER
vs.
ASHFORD. } No. 17. 6248. Equity.

The petition of Isabella W. Ashford respectfully shows to the court that some time before the beginning of this term she was served with a copy of the order passed herein on the 2nd day of January, 1884, by which she is commanded to cause her appearance to be entered in this cause as a defendant in the place of the appellee, deceased.

That she is advised that she ought not to appear as a de-
88 fendant herein, and that the order is improperly framed and as so framed was improvidently passed by the court.

That she has, therefore, authorized Calderon Carlisle, Esq., who is and has been her counsel, to appear specially for the purpose of bringing this petition to the attention of the court, and for her and on her behalf to move the court to rescind the order as herein passed against her.

And your petitioner further shows to the court that she has not received any trust fund from the estate of the appellee belonging to the appellant, and that the real estate in these proceedings men-

tioned has not been devised to your petitioner, and that she has no interest in this suit in her own right; and she is advised that there is well founded doubt as to whether she is a proper party in any representative capacity, and, if so, in what capacity; but she is further advised that there can be no doubt that she ought not to be compelled by this honorable court to enter her appearance herein in her own proper person as by the order aforesaid she is required
89 to do; and your petitioner further shows to the court that, although she is advised that the order aforesaid should be rescinded and she prays the court to rescind said order, she is not desirous of avoiding the penalty therein contained, as she is advised that the court will, in the absence of an appellee, look into the proceedings had in the court below only to see if there be error therein, and, if there be no error, will not pass any further or other decree in the premises; and she is further advised that it is the custom of courts in like cases to hear solicitors or counsel as *amici curiæ* for the purpose of having the decree below sustained and upheld.

That your petitioner cannot afford to employ counsel to argue, that she is informed *it* is a case requiring laborious preparation, but she respectfully shows to the court that George F. Appleby and William E. Edmonston, Esq'res., were the counsel and solicitors of the defendant, F. A. Ashford, deceased, and conducted all the proceedings in the court below holding a special term, and had prepared
90 an argument during the lifetime of the appellee to be delivered in this court and were actually pressing for a hearing during his lifetime when, as she is informed and believes, this court at the instance of W. D. Davidge, Esquire, counsel for the appellant, who was then engaged in the defense of the accused in the Star Route cases then pending before the criminal court, caused the appeal herein to be continued, and she is informed and believes that the said Appleby & Edmonston are willing to file their statement of the case, their argument, and their brief, and to argue the cause, as *amici curiæ*, if not otherwise engaged.

And in case the court shall not deem it proper to re-cind said order of January 2nd, 1884, and shall proceed according to its terms to hear the cause in the absence of an appellee, your petitioner avers that the court ought in justice to accept the assistance of *amici curiæ* and to prefer that of the said Appleby and Edmonston, if not otherwise engaged, and if upon such hearing and an examina-
91 tion of the proceedings below the court shall be of opinion that there is error in the decree below or that your petitioner ought to be made a party in any representative capacity, she will cheerfully and promptly obey any order which the court may make requiring her to appear in such representative capacity without putting the appellants to any delay by causing her to resort to other or further compulsory proceedings in lieu of the said order of January 2d which was, as your petitioner is advised, improperly framed and as so framed improvidently passed by the court.

And as in duty bound your petitioner will ever pray, &c.,

ISABELLA W. ASHFORD.

CALDERON CARLISLE, *Solicitor.*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and the facts therein stated of my own knowledge are true and those stated upon information and belief I believe to be true.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Ass't Clerk.

92 *Order to Speed Cause. Filed Feb'y* 13, 1884.

KELLER *vs.* ASHFORD. } No. 6243. Equity.

The motion of Isabella Ashford to rescind the order passed on the 2d of January, 1884, or, in the event of such order not being rescinded, that the court hear *amici curiæ*, is hereby, after argument, overruled, and it is ordered that upon the failure of the said Isabella Ashford to appear, as required by the said order, within five days from the date of this order, which additional time to appear is granted at the instance of the solicitor of the said Isabella, specially appearing, that the cause be proceeded with according to the rule of this court and the order of the 2d of January, 1884.

By the court:

D. K. CARTTER,
Chief Justice.

Feb'y 13, 1884.

93 *Petition of I. W. Ashford, Executrix to Appear as Appellee. Filed Mar.* 17, 1884.

In the Supreme Court of the District of Columbia. In General Term.

KELLER *vs.* ASHFORD.

The petition of Isabella W. Ashford respectfully shows unto this honorable court:

1. That she is the widow of Francis A. Ashford, deceased, who was defendant and appellee in this cause.

2. That pending the appeal herein the said Francis A. Ashford departed this life on the 19th day of May, 1883, leaving a widow and five young children, the eldest being then nine years of age, and the youngest having since deceased.

3. That by the last will and testament of Francis A. Ashford, deceased aforesaid, your petitioner is named executrix of said will, and, on the first day of June, 1883, the said will was duly admitted to probate and your petitioner duly qualified as executrix, and received letters testamentary on the said estate, as will more fully appear from the records of this court holding a special
94 term for orphans' court business, reference to which, so that the same may be read as part hereof, is hereby craved.

4. That on the 3d day of July, 1883, your petitioner filed her inventory of the personal estate of her said testator, and also a report

of the debts due to him in the office of the register of wills, of the District of Columbia, reference to which, so that the same may be read as part hereof, is hereby craved.

5. That by the said inventory and report it is shown that her testator left personal property to the amount of $2,876.80, separate debts due him to the amount of $2,000, and cash to the amount of $652.00, in all $5,528.80.

6. That by the records of the office of the register of wills it appears that the amount of claims against the testator proved to February 27th, 1884, is $454.91.

7. She further states, that these claims were the only claims to the best of her knowledge and belief against the estate excepting those secured by deed of trust on real estate one of which was $6,000, secured on the house in which the said F. A. Ashford died and in part of which house your petitioner now lives, the rest of said
95 house being let so as to enable her to obtain some income for her support.

Wherefore, and by reason of the premises your petitioner prays this honorable court to pass an order in the above entitled cause, authorizing your petitioner as executrix of Francis A. Ashford, deceased to forthwith enter her appearance as appellee in the place and stead of the said Francis A. Ashford deceased so that the said appeal may be revived and heard at any early date, and your petitioner will ever pray, &c.

ISABELLA W. ASHFORD.

CALDERON CARLISLE,
Solicitor for Petitioner.

Subscribed and sworn to before me, in the District of Columbia, this 6th day of March, 1884.

WM. WARD MOHUN,
Notary Public.

96 *Appearance of Isabella Ashford Granted. Filed May* 2, 1884.

In the Supreme Court of the District of Columbia, in General Term. Frid., May 2, 1884.

HENRIETTA C. KELLER
vs.
F. A. ASHFORD. } 6342. Equity.

Upon the consideration of the petition of Isabella W. Ashford, executrix, filed March 17, 1884, it is ordered, this 2d day of May, 1884, that the petitioner be, and she is hereby, granted leave to enter her appearance in this cause in the place and stead of the defendant and appellee, deceased.

Decree in General Term. Filed Feb. 16, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

HENRIETTA C. KELLER, Complainant,
vs.
FRANCIS A. ASHFORD, Defendant. } 6243. Docket 18.

97 This cause coming on to be heard on the appeal of the complainant from the decree pronounced in special term on the ninth day of May, 1882, dismissing the bill with costs, and being argued by Walter D. Davidge, Esquire, for the complainant and appellant, and by George F. Appleby and Calderon Carlisle, Esquires, for Isabella W. Ashford, executrix of Francis A. Ashford, heretofore substituted in lieu of the appellee, deceased, and being submitted, it is thereupon, on consideration thereof, ordered, adjudged, and decreed by the court, this sixteenth day of February, 1885, that the said decree of special term be, and the same is hereby, affirmed, with costs, and that the said Isabella W. Ashford, executrix, recover against the complainant and Sylvester B. Boarman, her surety in the appeal undertaking, all the costs of the cause incurred by the defendant or her testator, to be taxed by the clerk, and have execution therefor. And from this decree the complainant appeals, in open court, to the Supreme Court of the United States; which appeal is allowed.

By the court:

D. K. CARTTER,
Chief Justice.

98 In the Supreme Court of the District of Columbia, the 18th day of February, 1885.

HENRIETTA C. KELLER
vs.
ISABELLA W. ASHFORD, Executrix of Francis A. Ashford, Deceased. } No. 6243.

Know all men by these presents that we, Henrietta C. Keller and George C. Boarman, are bound unto the above-named Isabella W. Ashford, executrix of Francis A. Ashford, deceased, in the sum of three hundred dollars, to be paid to the said Isabella W. Ashford, executrix of Francis A. Ashford, deceased, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of February, 1885.

Whereas the above-named Henrietta C. Keller hath prosecuted — to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Henrietta C. Keller shall prosecute her said appeal to effect and answer all damages and costs if *he* shall fail to make good *his*

plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) HENRIETTA C. KELLER. [SEAL.]
GEORGE C. BOARMAN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved Feb'y 18, 1885.

D. K. CARTTER, *Ch'f Just.*

99 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 7th day of April, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of the said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 7th day of April, 1885.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justices Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 7th day of April, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Endorsed on cover: Dist. of Columbia Supreme Court. No. 219. Henrietta C. Keller, appellant, *vs.* Isabella W. Ashford, executrix of Francis A. Ashford, deceased. Filed 10th April, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

HENRIETTA C. KELLER, *appellant*,

vs.

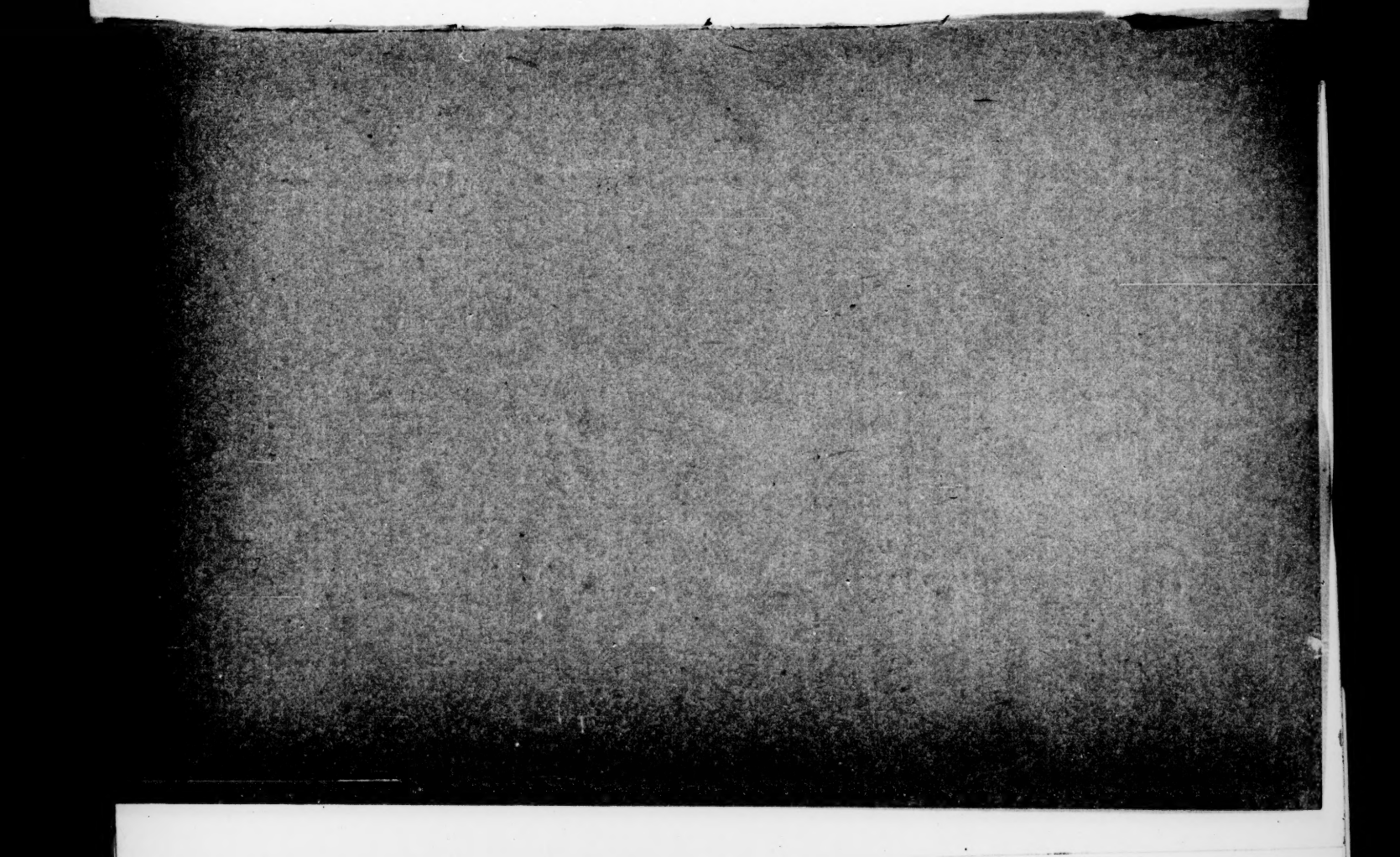
ISABELLA A. ASHFORD, *executrix*

of FRANCIS B. ASHFORD, deceased.

Brief for Appellant.

WALTER D. DAVIDGE,
WM. W. BOARMAN,
for Appellant.

R. O. Polkinhorn, Printer.



Supreme Court of the United States.

OCTOBER TERM, 1887.

HENRIETTA C. KELLER, *Appellant*,
vs.
ISABELLA W. ASHFORD, *Executrix of* FRANCIS A. ASHFORD, *deceased*.
No. 219.

Brief for Appellant.

STATEMENT OF THE CASE.

On the 13th of May, 1878, Henrietta C. Keller filed her bill of complaint in the court below against Francis A. Ashford, alleging :

1. That on the 17th of August, 1875, one Archie Thompson, being seized in fee of lot five in Kelly's recorded subdivision of part of square 889, situated in the City of Washington, by his deed of trust (in the nature of a mortgage) of that date, conveyed the said lot five to one Martin M. Rohrer, in trust to secure his (Thompson's) note for $1,500, payable in three years from date thereof, to the order of Abner B. Kelly, with interest at the rate of ten per cent. per annum, until paid. (Printed Record, page 1 ; Exhibit to bill marked H. C. K., No. 1, R. 3–5.)

2. That on the 21st of February, 1876, the said Thompson and wife conveyed the said lot five to one William A. Gordon (by a deed of trust in the nature of a mortgage) in trust to secure his certain other note for $2,000, payable in one year after the date thereof at the rate of eight per cent. per annum until paid, to the order of Moses Kelly, who endorsed the same to the complainant, Henrietta C. Keller, who is the present owner and holder of said note. (R.1; Exhibits to bill marked H. C. K., No. 1 ; and H. C. K. No. 2, R. 5–8.)

3. That afterwards, to wit, on the 1st of January, 1877, the said Archie Thompson and wife, by their deed in fee conveyed the said lot five, with its improvements, (together in the other lots in the same square) to the defendant Francis A. Ashford, subject, however, to certain encumbrances resting thereon, to wit: the two encumbrances hereinbefore set forth in paragraphs one and two, payment of both of which said Ashford assumed, and for that purpose withheld and reserved from the consideration by him paid for said property so much thereof as was then an equivalent of, or was then necessary to cancel and settle said encumbrances. (R. 1. Exhibit to bill marked H. C. K., No. 4, R. 8–9.)

4. That said defendant Ashford accepted said deed in fee with its provisions imposing upon him the personal obligation aforesaid to pay said encumbrances, and by virtue thereof entered into possession of the property in said deed mentioned, and not only collected the rents and profits arising therefrom from the date of said deed until the sale made under the trust hereinbefore set forth in paragraph one of this bill, and hereinafter mentioned, but also paid inter-

est on said first mortgage to the holder thereof, and likewise paid the taxes charged against the same. (R. 1, 2.)

5. That, through complainant's agent, demand was made on said Ashford for the payment of the $2,000 note hereinbefore mentioned, and secured as aforesaid, and by her held, and that said defendant whilst he did not deny his liability to pay the same, yet neglected so to do, and now refuses to pay the same. (R. 2.)

6. That in pursuance of the provisions of the trust described in paragraph one, the trustee therein named, Martin M. Rohrer, after previous advertisement, on the 14th day of March, 1878, exposed to public sale said lot five in said square 889, and on the same day sold the same to John C. Harkness, at and for the sum of $1,700, a sum which was insufficient to satisfy and liquidate the debt secured by said trust, by reason whereof, the lien aforesaid of the complainant for the amount of said note for $2,000, and interest thereon has become wholly extinct, a deed having passed from said Rohrer, trustee, to the purchaser at said sale. (R. 2.)

Wherefore the complainant, being advised that the acceptance by said Ashford of the said deed in fee, imposing upon him, and charging him personally with the payment of the encumbrances resting thereon at the time of the said purchase, and the further fact that he withheld from the purchase money, or consideration paid for said property so much thereof as was then necessary to settle and liquidate said encumbrances, or was, in the negotiation involved in said transfer in fee, in any manner credited with an amount equivalent to the said en-

cumbrances by him assumed, was an appropriation by him of said part of said purchase money, or of the amount so credited as aforesaid, to the use of the complainant and constituted a fund by him held in trust for her benefit which this court will enforce in her behalf.

Therefore prays:

1. That the writ of subpœna may issue, commanding, &c. The answer of the defendant under oath is hereby waived.

2. That a decree may be made in favor of the complainant and against said Ashford for the amount of the note by her held and secured by the trust mentioned in paragraph two, assumed, as aforesaid, by said Ashford, together with the interest thereon according to its tenor, besides costs.

3. And for such other and further relief as the exigency of the case may require. (R. 2.)

THE ANSWER of the defendant, filed July 2, 1878, admits that on the 17th of August, 1875, Archie Thompson and wife conveyed lot five, with its improvements, to Martin M. Rohrer in trust to secure his (Thompson's) note for $1,500, as set forth in paragragh one of the bill. (R. 10.)

He admits that a paper purporting to be a deed bearing date January 1, 1877, wherein Archie Thompson and his wife are parties of the first part, and the defendant Ashford, is named as party of the second part, was recorded among the land records of the District of Columbia, which paper purported to convey to said Ashford lots 5, 7, 8 and 9 in square 889, in fee simple, subject, as stated in said paper, to certain encumbrances resting thereon. (R. 11.)

He denies that he ever assumed the payment of the two encumbrances mentioned in the 1st and 2d paragraphs of the bill, or that he for that purpose withheld and reserved from the consideration alleged in said bill to have been paid for said property so much thereof as was then an equivalent of, or was then necessary to cancel and settle the said encumbrances. (R., 11.)

He denies that he accepted said alleged deed in fee with its provisions imposing upon him the personal obligations aforesaid, to pay said encumbrances, or that he ever has accepted said alleged deed in any way, and denies that by virtue of said alleged deed he entered into possession of said property, unless the matters hereinafter stated be taken as matter of law to be an acceptance of said alleged deed, and he is advised that they are not to be so taken. (R., 11.)

He admits that he collected the rents of said property, but under the circumstances hereinafter stated, and not otherwise ; *and he also admits that he paid interest on the said first encumbrance, and taxes on said property*, but said payments were made under the circumstances hereinafter stated with reference thereto, and not in consequence of an acceptance of said deed with an agreement to pay either of the encumbrances mentioned in said bill. (R., 11.)

He admits that demand was made by the plaintiff's solicitor in this suit, Mr. Boarman, upon him for payment of said note, but said demand was made many months after the said alleged deed in fee was made, to-wit : some time in the month of February, 1878. (R., 11.)

The defendant states that he did deny his liability

for the payment of said note, and says he informed said solicitor that he did not intend to pay said note, and did not intend to keep said property; and that he never in any way admitted, and does not now admit any liability on his part to plaintiff, nor did said Boarman, in his earlier interviews with this defendant, insist, or even suggest that the defendant was personally liable to the plaintiff on the encumbrance alleged to be held by him. (R., 11.)

He admits that in pursuance of the provisions of the deed of trust from Thompson to Rohrer set forth in the first paragraph of the bill, said Rohrer, after previous advertisement, on the 14th of March, 1877, exposed to public sale lot five in square 889, and on the same day sold the same to John C. Harkness for the sum of $1,700, a sum which was insufficient to satisfy and liquidate the debt secured by said trust. (R., 11, 12.)

The defendant then sets forth a conversation and understanding he had with Moses Kelly, (*his father-in-law*, who sold and endorsed the $2,000 note to the complainant), in relation to the property conveyed to the defendant by Archie Thompson and wife; assigns reason why he paid interest to John C. Harkness on the $1,500 note secured by the first deed of trust, and why he paid taxes in arrear on the property; avers that Kelly was, at the time he told him said houses had been conveyed to defendant, and still is indebted to defendant for money advanced and loaned to Kelly in a sum far exceeding the value of said four houses and lots; states the circumstances under which he collected the rents of the property from February, 1877, to the 14th of March, 1878, the date of the sale of lot five to Harkness,

under the first deed of trust; says he had no understanding or agreement with Kelly, or with any one that he would assume or pay the said encumbrance of $1,500, on said property, or any other encumbrance thereon; and avers that he had no knowledge, notice, or intimation of the existence of the deed of trust to Gordon, or the note secured thereby, until eight or ten months after he was informed that the property had been conveyed to him; that he has never seen, read, or heard read, the said alleged deed to him, or a copy thereof, nor was he ever aware that said alleged deed contained any clause or provision making him, in express terms, or otherwise, assume the encumbrances therein, or requiring him to pay the same, *until a short time since, when notified that such was the fact.* (R. 12, 13.)

He avers that the only knowledge he had of there being a deed to him, or of the terms thereof, until long after the same had been recorded, *was what he learned from said Kelly in the month of February*, 1877, a month or more after the deed had been recorded, who then stated to defendant *that he, Kelly, had had deeded to this defendant lots on H street, between 7th and 8th streets, northeast:* that although there was an encumbrance on said houses, he (said Kelly) thought the equity in said houses was worth something, and that he thought he would sell them in such a way as to pay defendant some part of his (Kelly's) indebtedness to defendant, and told the defendant that he might collect the rents and apply them to the payment of the said indebtedness to defendant, but that it would be necessary for defendant to pay the interest due to Mr. Harkness on the note held by him which was secured on said prop-

erty, as he, Harkness, was pushing for it. (R., 13, 12.)

Further answering, the defendant says that before this suit was begun, the complainant herein sued at law, said Archie Thompson and Moses Kelly, maker and endorser of said note alleged to be held by her, and recovered judgment thereon against said Thompson and Kelly on the law side of this court, on which judgment execution has been issued, which judgment and execution are (the defendant is advised) a bar to this suit. (R. 14.)

He further says that if the complainant has any remedy it is in law and not in equity. (R. 14.)

A general replication was filed. (R. 14.)

The case came on to be heard at the April term, 1882, of the court, before Hagner, J., holding a special term, and on the 9th of May, 1882, it was ordered, adjudged and decreed that the bill be dismissed with costs. (R., 63, 64.) From this decree an appeal was taken by the complainant to the General Term. (R., 64.) On the 6th of November, 1883, the counsel for defendant suggested to the court in General Term, the defendant's death, (R. 64) he having died pending the appeal. (R. 68.) On the 2nd of January, 1884, the court made an order that Isabella W. Ashford, as the representative of the realty and personalty of the deceased, cause her appearance to be entered as defendant in the place of the deceased. (R. 68.)

On the 14th of March, 1884, said Isabella W. Ashford, as executrix of the deceased, filed her petition praying that she might enter her appearance as de-

fendant and appellee in the place and stead of Francis A. Ashford, deceased; and on the 2nd of May, 1884, the court granted the prayer of the petition. (R. 69.)

On the 16th of February, 1885, the cause was heard at General Term on the appeal of the complainant from the decree pronounced in special term, dismissing the bill with costs; and it was thereupon ordered, adjudged and decreed that the said decree of the special term be affirmed with costs. (R. 70.)

From this decree an appeal was taken to this court. (R. 70.)

From the foregoing, it will be seen that the case presented by the appellant is, that where the purchaser of an equity of redemption covenants *or promises* the grantor, by the terms of the deed, to pay off an encumbrance upon the land for which the grantor is personally liable, this duty or obligation of the purchaser enures to the benefit of the mortgagee, or creditor in the encumbrance, and he may, *in equity*, compel such purchaser to respond directly to him.

Assignment of Errors.

1. The Court, in General Term, erred in adjudging that the decree of the Special Term, dismissing the bill with costs, be affirmed (R., 70.)

2. The Court erred in refusing to decree that the grantee in the deed was liable to the appellant for the amount of the note, with interest, by reason of the assumption of the mortgage debt.

3. The Court erred in not decreeing that the remedy for the said liability was in equity.

The Facts and the Evidence.

Archie Thompson became the owner, in 1875 and 1876, by purchase, of lots 5, 7, 8 and 9 in Kelly's subdivision of square 889. (R. 19.) The lots were clear of encumbrances when Thompson bought them. (R. 19.) After the purchase he put a house on each of said lots 5, 7, 8 and 9. Each house cost $2,900. (R. 19.) *The houses were all alike.* (R. 21.) Thompson then gave a deed of trust, by way of mortgage,

dated August 17, 1875, on lot five to Martin M. Rohrer, as trustee, to secure his (Thompson's) note to Abner B. Kelly for $1,500. (R. 19, 3, 4.) Subsequently he gave another deed of trust, by way of mortgage, on said lot five, dated February, 21, 1876, to Wm. A. Gordon as trustee, to secure his (Thompson's) note to Moses Kelly for $2,000. (R. 19, 5–8.)

This is the note held by the complainant. He and and his wife also put deeds of trust, by way of mortgage, for $2,000 each, on each of said lots 7, 8 and 9. (R. 21, 24.) Then, on the 1st day of January, 1877, Thompson and wife conveyed to Ashford in fee said lots 5, 7, 8 and 9, with the improvements, subject to all these deeds of trust, or encumbrances then resting thereon, payment of which encumbrances, it is alleged in the deed, is assumed by the grantee. (R. 8, 9.) The grantee did not sign the deed, it is signed only by Thompson and wife. (R. 8, 9.)

When Thompson and wife made the deed to Ashford, the grantee was to assume the encumbrances upon the lots conveyed, and relieve Thompson from all liability. (R., 20.) He was to be relieved from all liability then existing on these lots, *and the notes he had given secured by deeds of trust on them.* (Thompson's Test'y, R., 20.) *No consideration was actually paid to Thompson for making the deed.* (R., 20.) *Each house and lot was worth* $4,000, (R., 21,) *making the total value of the property unincumbered conveyed to Ashford*, $16,000. (R., 21.) Ashford says, in his answer, that lot five with the house thereon, which was sold by Rohrer, trustee, to Harkness for $1,700, (R., 2, 11, 12,) *did not bring more than half its value.* (R., 13.) *As the houses were all alike*, this would make the total value of all the property conveyed to him, according to his own admission, $13,600. (See cross-examination of Ashford at pages 43 and 44 of the record.) At the time of the conveyance by Thompson and wife to Ashford, there were two deeds of trust on lot five, one for $1,500 and one for $2,000; and a deed of trust for $2,000 on each of lots seven, eight and nine, making the aggregate encumbrances amount to $9,500. (R., 21.)

These encumbrances were all on the property and unpaid when the conveyance was made to Ashford. (R. 21, 22, 1, 2, 10.) The deed to Ashford was delivered to Moses Kelly by Thompson. (R. 22.) Thompson never had any negotiations with Ashford about the property. He was not acquainted with Ashford. (R. 21.) Kelly went to Thompson's house one night with a notary, and said to Thompson that he had some deeds with him which he wanted Thompson and his wife to sign, transferring lots 5, 7, 8 and 9, and other property. Thompson replied: "I do not like to transfer all my equity away without knowing how I am to be secured; there are outstanding notes and other things that had to be paid, and this property was supposed to take care of some of them." Kelly then told Thompson that if he would deed the property *he would see that all debts and outstanding notes that might be against him should be paid*, and that he would also deed ground to Thompson to pay him. Thompson executed the deed then and there to Ashford on these representations of Kelly. (R. 22, 23.) According to Ashford's statement of values, the four lots, with the houses thereon, conveyed to him were worth, unincumbered, at least $13,600. The encumbrances were $9,500. The equity of redemption was therefore worth, according to Ashford's estimate, about $4,100. Now the consideration expressed in the deed is $4,500, *about the value of the equity of redemption*. It was the understanding of Thompson when he executed the deed to Ashford and delivered it to Kelly that he was to be relieved from all liability on his notes secured by the deeds of trust on lots 5, 7, 8 and 9, (R. 20, 22;) and this understanding is expressed in

the deed itself: "*subject, however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part.*" (R. 8.) It is rather a sad commentary, so far as Thompson is concerned, that he not only did not receive the purchase money for his equity of redemption ($4,500) but, after the conveyance to Ashford, a personal judgment was recovered against him for $2,000 on one of his notes secured by a deed of trust on lot five, and that judgment is now outstanding against him unsatisfied. (R. 48.)

The property conveyed to Ashford *was actually worth* $16,000. According to Ashford's statement it was worth at least $13,600. The consideration expressed in the deed is $4,500. The presumption, therefore is, in view of the above recited facts, and in view of the clause in the deed that it was made subject to certain encumbrances now resting on lots 5, 7, 8 and 9, *payment of which is assumed by the grantee*, that Ashford withheld and reserved so much of the purchase money or consideration paid, or to be paid, for said property as was then an equivalent of, or was then necessary to cancel and settle, the encumbrances resting thereon; or that he was, in the negotiation involved in the transfer, credited with an amount equivalent to the encumbrances by him assumed; and that the grantor was to be relieved from all liabitily on his notes to secure which the encumbrances were made, and that this money so retained or credited, constitutes a *trust fund* in the hands of the grantee held for the benefit of the complainant.

The deed to Ashford, dated January 1, 1877, was delivered to Kelly, as above stated, and it was recorded *January* 22, 1877. (R. 8.) There is a mem-

orandum written on the margin opposite the record of the deed in the Recorder's office, to the effect *that the deed was delivered to the grantee February* 19, 1877. (R. 30, 31.) We do not regard this entry on the margin as conclusive evidence that the deed was taken out of the Recorder's office by Ashford, as Kelly, or his agent, might have taken it out by presenting the Recorder's receipt, but in view of the facts hereafter stated, we claim that the memorandum is a *pregnant circumstance*, and should have much weight.

Ashford says he knew nothing of the deed from Thompson and wife to him until February, 1877, about a month after the deed was recorded, and that Kelly then informed him that he (Kelly) HAD HAD deeded to him the property. (Answer, R. 12.) Ashford testifies on cross-examination, as follows:

"Mr. Kelly stated to me some time in February, 1877, that he HAD HAD deeded to me several houses and lots. *He specified where these houses and lots were located. He then stated to me that there were encumbrances, or liens, or deeds of trust on the property*, but he did not specify nor did I enquire at the time which of the houses and lots had a mortgage upon it, but the only one spoken of was the one held by Mr. Harkness, and upon which there was a year's interest in arrears. I think *I commenced to collect the rent on lot five from about March*, 1877, *and continued to collect them until the* 14*th of March*, 1878, the date of the deed to Harkness. *I also collected rents from some of the other three houses conveyed to me by the deed. I collected or attempted to collect rents from all four of the houses.* I paid several years' back taxes on all four of the houses. These taxes were paid up to June 30, 1877. (R. 35, 36.) *If one of the houses became vacant I probably put it up for rent*, but I have no memory of having done so." (R. 38.)

On the 4th of December, 1877, Ashford and wife conveyed in fee simple to Thomas Duncan lots 7 and 8, for $3,000, subject to existing encumbrances thereon. (R., 31, 32.) When questioned on cross-examination as to this deed, Ashford says:

Question. Did you convey in fee simple to Thomas Duncan two of the houses and lots conveyed to you by Archie Thompson, namely, lots seven and eight, in Kelly's subdivision, in square 889?

Answer. I believe I did. (R., 38.)

Question. In your deed to Thomas Duncan, dated December 4, 1877, you state that lots seven and eight, in square 889, are conveyed subject to existing encumbrances thereon; did you not then know, or had you not reason to believe that encumbrances existed on said lots?

Answer. I had been informed there was an encumbrance on each, of $1,500. (R., 40.)

Now, we hold that the knowledge communicated to Ashford in February, 1877, that the four houses and lots in question had been "deeded" to him, *which deed was then on record*, coupled with the fact that he at once entered into possession of the property, collected the rents, made leases, paid taxes on all the property, and the interest on one of the encumbrances, *and conveyed by deed, in fee simple one-half of the property for* $3,000, *the purchaser taking subject to existing encumbrances, estop* him from denying that he accepted the deed, or had notice of its contents, and it is wholly immaterial whether he actually saw the deed, or knew of its contents, or was aware that it contained a clause that the grantee was personally liable for the encumbrances. *These acts alone constituted an acceptance of the deed.*

But we unhesitatingly affirm that no honest mind can carefully read and analyze the testimony set forth in the record, with its tell-tale exhibits, without being convinced beyond a shade of doubt, that *certainly as early as September*, 1877, Ashford had full knowledge and notice that the deed was made to him by Archie Thompson and wife, and that it contained a clause that the payment of the encumbrances resting on the property conveyed was assumed by the grantee; yet, in the face of this knowledge, he collected the rents of the property for six months afterwards, *and actually sold one-half the property two or three months afterwards.*

The $2,000 note (R. 8) made by Thompson (R. 16) and secured by the second deed of trust on lot five (R. 5-7) was sold, before its maturity, namely in February, 1876, by Moses Kelly, the payee, to Miss Keller, the complainant, she paying full value therefor. (R. 11, 15-17.) Mr. Kelly endorsed it to her. (R. 20, 8.) She then put it in the Metropolitan Bank for collection. (R. 16.) While it was in bank she made inquiries about the note to Kelly, and, at one time, after the note had matured (R. 18), she demanded payment from Kelly, who then told her *that he had turned over the property on which the note was secured to Dr. Ashford, and she should hold Dr. Ashford responsible* (R. 16); *that he was responsible.* (*Miss Keller's test'y*, R. 16.) *When he said this Kelly was the father-in-law of Dr. Ashford.* (R. 16, 17.) The note fell due in February, 1877. (R. 8.) Miss Keller withdrew the note from bank after it fell due. (R. 16, 17.) She then placed it in the hands of Mr. Wm. W. Boarman, an attorney-at-law, for collection. (R. 17.)

Neither the principal of the note nor any interest has been paid. (R. 15.)

On the face of the note, in the margin, these words are written: "*secured by deed of trust lot 5, sq. 889.*" (R., 8.)

Mr. Boarman testifies as follows:

"I am a member of the bar of the Supreme Court of the District of Columbia The complainant placed in my hands for collection a note *sometime about the summer of* 1877. I made a partial examination of the title to the property upon which this note is secured. The result was the finding of several deeds touching the property. (R. 23.) After the note was placed in my hands I called to see the defendant, Dr. Ashford in regard to its settlement. The exact time I visited him for that purpose I cannot state, *but it was some time in the month of August, or, at the latest in September*, 1877, I called to see him several times. *At the first interview*, I explained the reasons of my visit, and asked what disposition or settlement he intended to make of the note, *and when he would pay it*. He informed me he would soon pay some on the interest then due on the note, and would shortly thereafter arrange for its full settlement. *At the first interview* I informed Dr. Ashford that from my examination of the land records I had discovered a deed conveying said lot five to him in fee, subject to the encumbrances resting on the same. I also informed him what encumbrances I had found, and that the $2,000 note held by Miss Keller was secured by one of them. In regard to its payment he said he was not then able to state definitely at what time he would be able to pay, but would soon be able to arrange for its settlement. I saw him several times in regard to the payment of the note, and tried, in various ways, to settle upon some plan of payment. One, I recollect I proposed, was for him to pay off the first mortgage on lot five, and for this purpose, with his knowledge, I attempted to make

arrangements with Mr. Harkness who held the note secured by the first mortgage. This plan, however, fell through by reason of Mr. Harkness' unwillingness to allow the payment of the note he held to be anticipated. (R. 24. 25.) (See letter of Mr. Harkness to Mr. Boarman, *dated Sept.* 29, 1877, (R. 57); also two other letters written by Harkness, one to Ashford and the other to Boarman. (R. 57.) The last note from Harkness to me was received Oct. 16, 1877. (R. 58.) At my first interview with Dr. Ashford, I made a request for the payment of the note. Dr. Ashford is mistaken when he states, in his answer, that no demand for payment was made until February, 1878. *At my first interview* I informed him that the deed from Thompson and wife to him showed that he (Ashford) took the property subject to the encumbrances existing thereon, *and that the payment of these encumbrances was assumed by the grantee.* (R. 25.) *At this first interview*, Dr. Ashford did not deny his liability to pay the note. The question was not discussed. (R. 26.) After the first interview, *and on or about October* 3, 1877, I received a note from Dr. Ashford. (This note is dated October 3, 1877, and will be found on pages 26 and 27 of the record.)

Question. Dr. Ashford says, in this note, that if Miss Keller "*is wise she will take the house and lot, although it is against my personal interest so to advise. It is fully worth what it will stand her.* Had you, *before the receipt of this note*, talked to Dr. Ashford as to the value of the house and lot referred to? If so, state what house and lot was meant, and state if anything was said by Dr. Ashford relative to its value. (R. 27.)

Answer. Yes; I had such a conversation, no doubt, with him. Such conversation was in relation to the property conveyed to secure the $2,000 note. As to the last portion of the question, I have now no distinct recollection that he stated the property to be worth any particular sum, but intimated that Miss Keller would be secure by taking the property in satisfaction of her claim, as the property was then encumbered. (R. 27.)

Question. Do I understand you to mean that Dr. Ashford intimated to you, *in an interview before October* 3, 1877, that if Miss Keller took the property, namely, lot five, and the improvements thereon, it would be worth to her a sufficient sum to pay off or satisfy the $1,500 deed of trust, and also to pay or satisfy the $2,000 note, held by her, with interest?

Answer. I so understood, and not agreeing with him in this particular, I declined to advise Miss Keller to entertain the proposition. (R. 27.)

I gave notice, as counsel, both to Dr. Ashford and Moses Kelly, to produce the deed from Thompson and wife to Ashford. It has not been produced. (R. 30.)

"I am *sure* I told Ashford before he wrote the note, dated October 3, 1877, that there was a provision in the deed to him that the grantee should assume the payment of the encumbrances. (R. 45.) One of my reasons for recollecting what I have just stated is that *I know* that my first interview with him in regard to the matter was prior to the date of his note, (Exhibit No. 1, W. W. B., R., 26,) at which interview I made him acquainted with the clause in the deed just mentioned; another reason is that during the latter part of September, 1877, I prepared a letter to Dr. Ashford *dated September* 14, 1877, which contained in quotation marks the clause mentioned in the deed, making him liable for the encumbrances then resting on the property. (R. 45.)

"This letter was written on the day of its date. (R. 49.) I never mailed the letter and now have it in my possession. (R. 45.) This letter is an additional reason that I cannot be mistaken in regard to my informing him *prior to its date*, of the contents of the deed in question. (R. 45.) I did not send the letter because upon reading it over, it seemed to contain a reflection on Dr. Ashford. (R. 47.) (The letter is set forth at page 50 of the Record.) *Both Dr. Ashford and Moses Kelly reside in this city.* (R. 48.) Mr. Kelly is the father-in-law of Dr. Ashford. (R. 61.) In response to my notice on Mr. Kelly to produce before the examiner the deed from

Thompson and wife to Ashford, he *brought me a deed from Thompsom and wife to Gordon.* (R. 48.) I called frequently at Mr. Kelly's house in relation to the note held by Miss Keller, *and on one occasion met Dr. Ashford and Mr. Kelly in the parlor.*" (R., 48.)

Question. You have stated on cross-examination that you made a search of the land records, and took down the clause in the deed from Archie Thompson to Ashford referring to Ashford's liability. Did you take down this clause in the deed before or after your *first interview* with Dr. Ashford about the note held by Miss Keller? (R., 55.)

Answer. I took it down before, and showed him a paper containing that clause at our first interview. I read it over to him in his office. (R. 55.)

The witness resumes:

"At my *first interview* with Dr. Ashford I not only told him of the clause in the deed in question—I mean the deed from Thompson to him—*but I showed him the clause written on a piece of paper.* I called to see him by reason of that clause as I believed his liability to pay the Keller note under it; and I know that I then made him fully aware of the clause in question. It was that clause that prompted me to go to see him, inasmuch as I considered that he had by it assumed payment of the Keller note." (R.,58.)

Could evidence be stronger, more direct, more convincing, that Ashford was informed and knew of the clause is the deed holding him responsible for the payment of the encumbrances on the property *before* he wrote the tell-tale note of October 3, 1877? (R., 26--27.) If Ashford had simply purchased the property from Thompson, subject to the encumbrances, and there had been no provision in the deed that the grantee was to assume payment of the encumbrances, is it reasonable to suppose that Mr.

Boarman, *a lawyer*, would have harassed Ashford for the payment of a note for which he knew he was not in any way responsible? (R., 49.)

Ashford admits that Boarman informed him of the clause in the deed holding him responsible for payment of the encumbrances, and also demanded payment of the note, but he "*thinks*" he did not acquire knowledge of the clause in question, or that demand was made until the spring of 1878. Bearing in mind that the *first interview* between Boarman and Ashford took place before the date of Ashford's note of October 3, 1877 (Rec. 26), and that Ashford admits it took place as early as September, 1877 (R., 43), we will proceed to give extracts from Ashford's testimony. Ashford testifies:

"*Question.* When, and how did you *first learn* that there was on record what purported to be a second trust on lot 5? (R., 33.)

Answer. The first knowledge I had of it was through Mr. Boarman, the counsel in this case, who, I think, came to me to get me to pay the interest or collect it." (R., 33.)

Question. Please state, as nearly as you can, what occurred between Mr. Boarman and yourself at your interview in relation to the subject of the note held by Miss Keller? (R., 33.)

Answer. I manifested much surprise to learn that there was such an encumbrance on the property, and declined to pay the interest. Before leaving Mr. Boarman, I stated that there must be some mistake about it, and that I would see Mr. Kelly concerning the matter, but that if such an encumbrance did exist I should decline to accept the property; that I would not pay any interest, *nor would I be responsible for the note.* (R., 33.)

The witness resumes:

"*At the first interview I do not think* anything was

said about my being responsible for the payment of the principal of the note, but only the interest and the ordinary consequences of the non-payment of the interest. I mean by that the sale of the property. It was a long time after *the first interview* with Mr. Boarman, possibly it might have been at the second interview, although I *think* much later, *when he attempted to convince me that I was personally bound for the payment of the principal of that note;* this *I think* was in the spring following our first interview. I know it was in the spring. (R., 34.)

"*At the first interview* Mr. Boarman stated that the note had been put into his hands as attorney for Miss Keller. This he stated when he first broached the subject to me." (R., 34.)

Cross-Examined.

"*Question.* Did Mr. Boarman ask you to pay the $2,000 at any time *before October* 3, 1877? (R., 36.)

Answer. I am not certain about that. My impression is that *somewhere about that time* Mr. Boarman wrote me a note, in which it was intimated that drawing the rents from the property, I should secure Miss Keller's note, *and I rather interpreted his note as an endeavor on his part for Miss Keller to obtain from me recognition of it.* I am not positive about the contents of said note, but that is the impression which is still on my mind. (R., 36.)

Question. You have stated in your testimony in chief that Mr. Boarman, *at the first interview* he had with you, stated to you that there was an encumbrance on the property to secure the $2,000 note held by Miss Keller. Is this statement correct? (R., 37.)

Answer. I believe it is. (R. 37.)

Question. Can you state positively when you first learned that the deed from Archie Thompson to you contained a provision that the grantee in the deed was to assume the payment of the encumbrances on the property described in the deed?

Answer. I cannot. I think it was in the spring of 1878. (R. 37.)

Question. Might it not have been in the fall or winter of 1877? (R., 37.)

Answer. As I said before, I cannot be positive; but that is not my impression. (R,. 37.)

Question. You have stated in your examination in chief that at one interview with him you said to Mr. Boarman that you would convey the *property* to Miss Keller. What property do you mean; do you mean simply lot five, upon which Miss Keller held a deed os trust, or all the lots and houses conveyed to you by Archie Thompson? (R., 37.)

Answer. I meant the lot upon which she had a deed of trust, I suppose. (R., 37.)

Question. Did you ever exercise any acts of ownership or possession over any of the houses or lots described in the deed from Archie Thompson to you *after you learned of the provision in the deed holding you liable for the encumbrances?* I mean by acts of ownership or possesion whether you collected rents, or made conveyances in relation to the property? (Rec., 37.)

Answer. I collected the rents in order to reimburse myself, having already notified both holders of deeds of trust—at least the attorney on one side and Mr. Harkness on the other—that I could not keep the property, and that Mr. Harkness could sell, or I would convey the property to Miss Keller at any time. (R., 37.)

Question. Did you collect any rents *after you learned that the property had been conveyed to you by Archie Thompson*? (R., 41.)

Answer. As I have already stated I collected the rent up to the time the property, (lot five) was sold. Between the time I received such knowledge from Mr. Boarman, as above stated, I must have collected the rent after such knowledge. (R., 41.)

Question. When Mr. Boarman made a demand for the payment of the note, and tried to convince you that you were personally liable, did he not tell you that you were liable to pay it by virtue of the condition or recital in the deed from Archie Thompson

to you by which the grantee was to assume the encumbrances on the property? (R., 42.)

Answer. He told me that I was liable under the conditions of the deed, which he said he had examined. (Rest of the answer immaterial.) (R., 42.)

Question. What property did you offer to surrender to Miss Keller? Did you offer to surrender simply *lot five*, with the building thereon, or did you offer to surrender *all four* of the houses and lots? (R., 42.)

Answer. I offered to surrender the property upon which she had a mortgage or deed of trust, and at one time, at least, I offered in addition thereto, at the instance of Mr. Kelly, two notes secured by deed of trust, one of $1,500, and the other of $800. *I do not believe that I did offer all four of the houses and lots*, but at that time I think I should have been very willing, if it had ever occurred to me. (R., 42.)

Question. Why did you tell him (Mr. Boarman) that you would not hold the property unless you had been informed, or believed that you were liable to pay the encumbrances; the mere existence of deeds of trust on the property could not in any way affect your liability, and you had paid no consideration to Thompson? (R., 43.)

Answer. Because from the knowledge which I had obtained from him that a second mortgage, or deed of trust existed upon this property of which I had no knowledge or information, *and which knowledge had annoyed and worried me, and not knowing that other deeds of trust might be brought to light, I had determined to get rid of the property even at a sacrifice.*" (R., 43.)

The testimony of Ashford, so far from contradicting, actually strengthens and confirms the testimony of Boarman. He builded (for us) better than he knew. It is true Ashford says he "*thinks*" he did not acquire knowledge of the clause in the deed, holding him liable, until the spring of 1878. The most

charitable view we can place upon this shadowy and uncertain expression is that he was—*mistaken*.

The question logically arises, why was not Moses Kelly examined as a witness for the defendant? He was around, and might have explained the whole mystery. Of course the complainant could not go into the enemy's camp to procure him as a witness. He is Ashford's father-in-law. *The inference is that he could not have aided the defendant's case*, so he was very discreetly *left out*. There is no question but that either Kelly or Ashford had possession of the deed from Thompson and wife to Ashford after it was recorded. The record states it was delivered February 19, 1877, to the grantee. (R., 30.) Yet they failed to produce it upon notice, but Kelly, in response to the notice, while the testimony was in progress, brought in a deed *which had not been called for*. (R., 48.) While negotiations about the note were going on between Boarman and Ashford, Boarman met Kelly and Ashford in Kelly's house. This was early in the fall of 1877. (R., 48, 61.) The note matured February twenty-first, 1877. (R., 8.) Kelly told Miss Keller, after it matured, and when she demanded payment, that Ashford was responsible for it (R., 16, 18), that he had turned over the property to Ashford. (R., 18.)

We are willing to assume that Ashford offered or was willing to surrender *Lot Five* to Miss Keller when he learned there was a second deed of trust upon it, for the two deeds of trust amounted to $3,500 besides interest, and according to Ashford's estimate, Lot Five was worth unencumbered $3,400 (R., 43); but he says *he did not offer to surrender all four of the houses and lots*. (R., 37, 42.) Certainly not; for the

equity of redemption in the other three houses and lots was of considerable value, each of the three having only a $2,000 deed of trust or mortgage upon it; (R. 21) *and in fact in December*, 1877, *several months after he had been informed of the clause in the deed holding him liable for the payment of encumbrances, and after demand for the payment of the note had been made*, Ashford sold two of the other three houses and lots for $3,000, the purchaser taking the property subject to the encumbrances. (R., 31, 38, 40.) Ashford's hugger-mugger arrangement with Kelly seems to have been designed as an acceptance of the deed and title where profits could be made, but it was to have no operation where burthens were to be borne. Ashford says he collected rent *after he learned that the property had been conveyed to him by Thompson*, (R., 41,) and he admits *that he collected rents from the property conveyed after he learned of the provision in the deed holding him liable for the encumbrances.* (R., 37.)

If he collected rent even for a single day with this knowledge, *this act alone was an acceptance of the deed.*

Why was Ashford so desirous, as expressed in his letter of October 3d, 1877, that Miss Keller should take lot five in satisfaction of her debt (R., 26), and why did he tell Boarman, as he says, that he did not intend to hold lot five when he learned a second trust was upon it, and why did he become "*annoyed and worried*" when he learned of the second trust? (R., 43.)

The answer is plain. Because he learned at the *first interview* with Boarman, if he did not know it before (and we believe he knew it from the time

Kelly told him he had caused the deed to be made to him), that he had assumed the payment of the encumbrances on *all the property* conveyed to him, and he thought *lot five* was not of sufficient value to pay the two encumbrances upon it *with interest*. As to the other three lots conveyed to him, there was speculation in them, and these he did not offer to surrender, but held and trafficked in.

If Ashford really told Boarman he did not intend to hold lot five when he learned, in September, 1877 (R., 43), that there was a second trust on it, he had a strange way of showing his intention, for, by his own admission, he collected rent from it until March 14, 1878 (R., 35), and he stopped collecting then only from necessity, for on that day it was sold under the first trust. (R., 2.) He certainly did not say he did not intend to hold lots seven, eight and nine. (R. 47, 48.)

The theory that Ashford did not accept the deed is puerile and absurd, so we will assume he *did* accept it with all its terms and conditions, and proceed to discuss the law points involved. It should perhaps be stated that on the 13th of November, 1877, Miss Keller commenced an action at law against Moses Kelley and Archie Thompson on the two thousand dollar note held by her, (R., 29) and recovered judgment against them (R. 14), upon which judgment execution was issued, and returned by the marshal "*nulla bona*" April 15, 1878. (R., 48.)

Points.

POINT ONE.

The deed from Thompson and wife to Ashford, with the provision therein that he should assume payment of the encumbrances resting on the property described in the deed was accepted, absolutely, by Ashford, and he entered into possession under the deed claiming title and ownership. He did not take the property simply by way of mortgage or security for a debt due to him by Moses Kelly.

The facts showing the acceptance are fully set-forth in a preceding part of this brief.

The theory of the defence that Ashford accepted the property with the understanding between him and Kelly that it was to be held simply as a security for a pre-existing debt due from Kelly to Ashford, is not at all borne out by the facts. All the evidence on this point is the statement of Ashford, as follows;

"In February, 1877, Mr. Kelly stated to me that in order to secure me as much as possible from loss, he *had had* deeded to me several houses and lots, in which he thought there was considerable equity; that there was an encumbrance on the property; I don't know on which lots nor the amounts; he did not state the separate amounts, but said there was an encumbrance on them; but he did say that on one house and lot there was an encumbrance secured by deed of trust of $1,500 to Mr. J. C. Harkness, and that the interest on this was pressing; that if he would pay the interest to Mr. Harkness so as to prevent sale, that when he, Mr. Kelly was well enough, he then being sick in bed, he would relieve me of any further trouble in the matter; that he intended to take care that the encumbrance should not worry

me, I, stating at the time, that my professional duties would prevent my looking after the property; he stated also that I had better go on and collect the rents from this property so as to indemnify myself for the interest I was to pay Mr. Harkness, amounting to $150, and also to pay arrearages of taxes. (R., 32, 33.) Mr. Kelly was indebted to me at the time he made this statement and still is indebted to me in a sum far exceeding the value of said four houses and lots. (R., 12.) There was no understanding that I should take this property at any stipulated price. (R., 33.) The indebtedness due to me from Mr. Kelly has not been paid in whole or in part." (R., 44.)

Assuming this statement to be true, how the conclusion can be reached that Ashford took the property merely as "security," and not absolutely in *part payment* of his debt, *which was larger than the whole value of the property*, is beyond our comprehension. There is not one word in Ashford's statement to show the property was not to be absolutely his own. Kelly does not say he had caused the property to be conveyed by way of security or mortgage for the debt due, but, he says, "I have *had deeded* to you the property to secure you as much as possible from loss," that is, to pay in part what I owe.

The note fell due in February, 1877. (R., 8.) After the note had matured (R., 18,) and before it was placed in Mr. Boarman's hands for collection, (R., 17,) Miss Keller demanded payment from Kelly, who then told her *that he had turned over the property on which the note was secured to Dr. Ashford, and she should hold Dr. Ashford responsible;* (R. 16); that he was responsible, (Miss Keller's Test'y, R., 16). This declaration is rather inconsistent with the pretention that Ashford took the property as "security."

It is a significant incident that Kelly had had other ground conveyed to Ashford, except that described in the deed from Thompson. This ground was conveyed by some person other than Kelly, *at Kelly's instance*, and Ashford afterwards *accepted* the ground under the deed and treated it as his own. He bought it and paid for it at the time. (R., 36.)

Again we ask, where, oh! where is Kelly? He is the depository of the secret; he could pluck out the heart of this mystery; yet Kelly is silent; he makes no sign.

Ashford's subsequent statements and acts were wholly inconsistent with the theory that he took possession of the property *in the first instance* as security, and not absolutely. It is true he might have paid taxes and interest on encumbrances to protect his "security," but it was not necessary for his protection that he should collect rents, put tenants in possession, and convey one-half of the property in fee simple to Thomas Duncan. (R., 31, 38, 40.) *By his own admission he collected rents after he had learned that the property was conveyed to him by Thompson, and that the deed contained a clause holding him responsible for the payment of the encumbrances.* (R., 37, 41.)

He says he told Boarman when he was informed by him there was a second deed of trust on lot five that, if such was the case, "he should decline to accept the property;" that he offered to "*convey*" lot five to Miss Keller in satisfaction of her note; (R., 33) and that he notified both Harkness and Boarman, upon learning there was a second trust that he would not "*keep*" the property. (R., 37.) These declarations all show that, before knowledge of the

second trust was brought home to him, he *claimed ownership*. What right had he to "convey" lot five to Miss Keller if he took or held simply a security or pledge? Such transfer would have been, to say the least, an act of rather questionable morality.

But even if it were true that Ashford originally took the property upon the understanding with Kelly that it was only by way of security, and even if he never saw the deed or knew its contents, yet this constitutes no defense *as against the claims of the grantor, or those who are subrogated to his rights.* He knew some one, *and not Kelly*, had conveyed *by deed* to him (R., 32), *and that deed was then on record.* He took possession at once *by virtue of that deed*, and whether he saw the deed or not, or knew of its contents, the law presumes that he both saw and knew. There was no understanding or agreement *with the grantor* that the deed or the property should be taken by way of mortgage or security. The grantor (Thompson) testifies that he conveyed *the equity of redemption* to Ashford with the distinct understanding with Kelly that he was to be relieved from the payment of his notes secured by encumbrances on the property conveyed, that the grantee *was to assume the encumbrances* upon them and relieve him from liability; *that he was to be relieved from all liability for the encumbrances and the notes he had given secured by deeds of trust on them.* (R., 20, 22.) The deed to Ashford was delivered by Thompson to Kelly. *The deed was recorded.* Kelly *afterwards* told Ashford that *he had caused to be deeded to him the property.* Ashford at once took possession of the property, and exercised complete and sweeping dominion over it. *By doing so*

he ratified the act of Kelly in accepting the deed for his use. In so far he made Kelly his agent.

In *Cooledge* vs. *Smith*, 129 Mass., 554 (decided in 1880), the facts set up by the defendant to show that a deed had not been accepted were strikingly like the facts set up by the defendant for that purpose in case at bar. A deed, containing a recital that the land therein described was subject to a mortgage, "which the grantee assums and agrees to pay," was executed to a woman as grantee *without her knowledge or authority*, by the direction of her husband, *and was by him recorded. She never saw the deed and knew nothing of its contents* until after the land was sold by the mortgagee, when she repudiated the deed. *Soon after the deed was recorded*, she knew that the land had been deeded to her, *and claimed to be the owner of it.* It was held, however, that these facts warranted a finding that she had assented to the purchase, *and a ruling that she was bound by the recital in the deed.*

The court say:

"It is true that a contract made by one person as agent for another, without any antecedent authority, cannot be made binding upon the alleged principal by his ratification, unless that ratification is given upon a full knowledge of all the circumstances of the case. But it is equally well settled *that the principal cannot, of his own mere authority, ratify the transaction in part and repudiate it as to the rest.* He must either adopt the whole or none. (*Story on Agency, Sect.* 250.) It was impossible, thersfore, for the defendant to accept the deed and claim title under it, and to allow so long a time to elapse without any repudiation of it, *without at the same time accepting the terms of the deed and the nature of the title which it purported to give. A party must be*

presumed to know the contents and true meaning of a written instrument which he takes as evidence of title. Freeman National Bank vs. *Savery*, 127 *Mass.*, 75."

POINT TWO.

The grantee, Ashford, having accepted the deed and entered into possession, and having, by its terms, assumed the payment of the encumbrances then resting on the property conveyed, became personally bound to pay the amount of the $2,000 *note held by Miss Keller, the complainant, and secured by the second deed of trust on lot five, part of the property conveyed to him, and it was not necessary that he should sign the deed, and she could, in equity, compel Ashford to respond directly to her.*

The scheme of the bill is, that Ashford withheld and reserved from the consideration or purchase money by him paid, or to be paid, for the property, so much as was then an equivalent of, or was then necessary to cancel and settle the encumbrances resting on it; or that he was, in the negotiation involved in the transfer, credited with an amount equivalent to the encumbrances by him assumed, and that the grantor was to be relieved from liability on his notes to secure which the encumbrances were made, and that this money so retained or credited constituted a *trust fund* in the hands of the grantee held for the benefit of the complainant.

And this theory of the bill is fully sustained by the facts and the evidence. All the property conveyed to Ashford was actually worth, free from encumbrances, $16,000, (R. 21.) According to Ashford's statement it was worth unencumbered $13,600,

(R. 43-44.) The encumbrances upon it at the time the deed was made amounted in all to $9,500, (R. 19, 21, 44.) Now the consideration expressed in the deed is $4,500, (R. 8.,) although neither Ashford nor Kelly ever in fact paid the grantor anything. (R. 20.) The grantor (Thompson) testifies that he conveyed *the equity of redemption* with the understanding that the grantee was to assume the encumbrances upon the property, and that he was to be relieved from all liability for them, *and for the notes he had given secured by deeds of trust on the property*, (R. 20,) and the deed itself recites that the property is conveyed, "subject however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part," (R. 8.)

The presumption, therefore, is, that Ashford retained, or was credited with so much of the purchase money as was sufficient to pay off the encumbrances, which constitutes a fund in his hands for the benefit of the complainant.

Yet the bill, containing, as it does, a prayer for general relief, is broad enough to cover every ground of equitable jurisdiction that can arise or be suggested suited to the facts established by the pleadings and the evidence.

"Where the purchaser of the equity of redemption covenants or *promises* the grantor to pay off an encumbrance upon the land, this duty or obligation enures for the benefit of the mortgagee or creditor in the encumbrance, and he may, *in equity*, compel such purchaser to respond directly to him."

Story's Eq. Juris., (12th Ed.) Sect. 1016 d.

This section is introduced in the text by Judge Redfield.

In his late work on Equity Jurisprudence (1886) Mr. Pomeroy says:

"The mortgagor may not only convey the premises subject to the mortgage; he may also convey them in such manner that the grantee assumes the payment of the mortgage debt, and thus renders himself personally liable therefor. The element which lies at the bottom of such assumption, *and which alone gives it efficacy according to the theory held by some courts*, is the fact that the mortgage debt is included in the purchase price as a constituent part thereof, and the grantee actually pays, or secures to his grantor only the balance of the gross price after deducting such debt. No particular form of words is necessary to create a binding assumption, it is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt, but this intent must clearly appear. Where the deed, *executed by the grantor*, contains a clause sufficiently showing such an intent, *the acceptance thereof by the grantee consummates the assumption*, and creates a personal liability on his part, which enures to the benefit of the mortgagee, *as though he (the grantee) had himself executed the deed*. When a grantee thus assumes payment of the mortgaged debt, as a part of the purchase price, the land in his hands is not only made the primary fund for payment of the debt, *but he himself becomes personally liable therefor to the mortgagee, or other holder of the mortgage*. The assumption produces its most important effect *by the operation of equitable principles*, upon the relations subsisting between the mortgagor, the grantee, and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of surety-ship. As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption,

he is bound to recognize the condition of suretyship and to respect the rights of the surety, in all of his subsequent dealings with them."

Pomeroy's Eq. Juris., Vol. 3, Sect. 1206.

Mr. Jones, in his able treatise on mortgages, says:

"To create a liability on the part of the grantee to pay an existing mortgage, *it is not necessary that he should sign the deed, or any obligation; his acceptance of a deed imposing this obligation upon him is all that is necessary.* By the acceptance of a deed which provides that the grantee shall assume and pay a specified mortgage, *he binds himself as effectually as he would by executing the deed himself as an indenture.* This provision becomes an express agreement on his part, for the fulfilment of which he is personally liable, not only to his grantor, *but the benefit of it enures to the mortgagee who may in equity enforce it directly against such purchaser.* When foreclosure is made by an equitable suit, the mortgagee may treat both the vendor and purchaser as principal debtors to him, and may have a personal decree against either or both of them. It is not necessary that the holder of the mortgage should notify the purchaser who has assumed the mortgage of his acceptance of the promise to pay the debt. The bringing of suit is a sufficient acceptance."

Jones on Mortgages, Vol. 2, Sect. 752, (3d Ed.)

In *Trotter* vs. *Hughes*, 12 N. Y., 84, DENIO, J., rendering the unanimous opinion of the court, says: "The acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance, binds him as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee."

To the same effect:

Crawford vs. *Edwards* 33 Mich., 354;
Urquhart vs. *Brayton*, 12 R. I., 169;
Hugler vs. *Atwood*, 26 N. J. Eq., 504;
Bishop vs. *Douglass*, 25 Wis., 696;
Ricard vs. *Sanderson*, 41 N. Y., 179.

In *Spaulding* vs. *Hallenbeck*, 35 N. Y., 204, the court say: "The grantee having accepted the deed and taken possession under it, is bound by the covenants therein contained; as effectually as if he had signed them."

In *Belmont* vs. *Coman*, 22 N. Y., 438, Judge Comstock says: "It needs no authority to prove that if in the conveyance there are words importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, *although he did not sign or seal the instrument*. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do."

In *Locke* vs. *Homer*, 131 Mass., 93 (1881), it is held that the acceptance of a deed covenanting that the premises are free from incumbrances except a mortgage, "which the grantee assumes and agrees to hold the grantor harmless from," binds the grantee to pay the mortgage debt; and in an action on that agreement after maturity of the mortgage, *the grantor may recover the amount due thereon*, although he may have paid no part of it. In this case GRAY, C. J., says:

"The fact that the agreement of the defendant is contained, not in a bond, covenant or indenture executed by himself, *but in a deed poll* made to and accepted by him, affects the mode of declaring only, and not the extent of his liability. By the law of

this Commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform, according to its terms, any promise or undertaking therein expressed to be made in his behalf, although, not having himself signed the deed, he must while the old forms of action were retained, have been sued in assumpsit, and not in covenant."

In *Pike* vs. *Brown*, 7 Cush. 133, Chief Justice Shaw, in delivering judgment, said :

"The principle is well established that where one, *by deed poll*, grants land, and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, *and the grantee accepts the deed and enters on the estate*, the grantee becomes bound to make such payment, or perform such duty, and not having sealed the instrument he is not bound by it as a deed, but it being a duty, the law implies a promise to perform it."

The principle that where the purchaser of the equity of redemption covenants or *promises* the grantor to pay off an encumbrance upon the land, this duty or obligation enures for the benefit of the mortgagee, or creditor in the encumbrance, and he may, *in some form of action*, compel the purchaser to respond directly to him, is sustained by a long line of cases, some of which, grouped by States, are given below :

Halsey vs. *Reed*, 9 Paige Ch., 446 ; *King* vs. *Whitely*, 10 Paige Ch., 465 ; and cases therein cited ; *Trotter* vs. *Hughes*, 12 N. Y., 74 ; *Curtis* vs. *Tyler*, 9 Paige Ch., 431 ; *Garnsey* vs. *Rogers*, 47 N. Y., 233 ; *Pardee* vs. *Treat*, 82 N. Y., 385 ; *Lawrence* vs. *Fox*, 20 N. Y., 268 ; *Burr* vs. *Beers*, 24 N. Y., 178 ;

Thorp vs. *Keokuk Coal Co.*, 48 N. Y., 253; *Atlantic Dock Co.* vs. *Learitt*, 54 N. Y., 35; *Ricard* vs. *Sanderson*, 41 N. Y., 179; *Spaulding* vs. *Hallenback*, 35 N. Y., 204; *Vrooman* vs. *Turner*, 69 N. Y., 280; *Urquhart* vs. *Brayton*, 12 R. I., 169; *Hoff's Appeal*, 12 Harris, (Pa.) 200; *Moore's Appeal*, 88 Penn. St., 450; *Merriman* vs. *Moore*, 90 Penn. St., 78; *Townsend* vs. *Long*, 77 Penn. St., 143; *Justice* vs. *Tallman*, 86 Penn. St., 147; *Crawford* vs. *Edwards*, 33 Mich., 354; *Miller* vs. *Thompson*, 34 Mich., 10; *Strauhaüer* vs. *Valtz*, 42 Mich., 444; *Booth* vs. *Conn. Mut. L. Ins. Co.*, 43 Mich., 299; *Crowell* vs. *Currier*, 27 N. J. Eq., 152; *Hugler's Ex'rs* vs. *Atwood*, 26 N. J. Eq., 504; *Klapworth* vs. *Dressler*, 2 Beasley, (N. J.,) 62; *Norwood* vs. *DeHart*, 30 N. J., Eq., 412; *Crowell* vs. *Hospital of St. Barnabas*, 27 N. J. Eq., 650; *Thompson* vs. *Bertram*, 14 Iowa, 476; *Corbett* vs. *Waterman*, 11 Iowa, 86; *Lamb* vs. *Tucker*, 42 Iowa, 118, *Bowen* vs. *Kurtz*, 37 Iowa, 236; *Bishop* vs. *Douglass*, 25 Wis., 696; *Schumucker* vs. *Sibert*, 18 Kans., 104; *Rogers* vs. *Herron*, 92 Ills., 583; *Gantzert* vs. *Hoge*, 73 Ills., 30; *Coffin* vs. *Adams*, 131 Mass., 133, (1881); *Miller* vs. *Billingsby*, 41 Ind., 489; *Fitzgerald* vs. *Barker*, J., 70 Missouri, St. R. 686; 26 Am. Rep., 660, *note*, where some of the above cited cases are discussed. See *George* vs. *Andrews*, 60 Md., 26.

In most of the cases above cited the reght of the mortgagee or creditor to compel the purchaser to respond directly to him is based purely upon *equitable principles*, as laid down in *Halsey* vs. *Reed*, 9 Paige ch., 446; *King* vs. *Whitely*, 10 Paige ch., 465; *Curtis* vs. *Tyler*, 9 Paige ch., 432; *Trotter* vs. *Hughes*, 12 N. Y., 74; *Crowell* vs. *Hospital of St.*

Barnabas, 27 N. J. Eq., 650; *Crowell* vs. *Currier*, 17 N. J Eq., 152; and *Crawford* vs. *Edwards*, 33 Mich. 354. Under this view the remedy of the mortgagee or creditor is *in equity*. Referring to the principles laid down in these last mentioned cases, Mr. Jones says:

"The ground upon which a mortgagee is allowed to take advantage directly of the usual clause in a deed, whereby the grantee assumes the payment of the mortgage, is generally stated to be that as between the parties to the deed the grantee thereby becomes the principal debtor for the mortgage debt, which had been allowed to him out of the purchase money, and the grantor is thenceforward merely a surety for the debt; and then upon the familiar principle that the creditor is entitled by way of equitable subrogation to all securities held by a surety of the principal debtor, the mortgagee is entitled to the benefit of this agreement made by the purchaser, although he did not know of its existence till long afterwards. A court of equity having the mortgagor, the mortgagee, and the grantee before it, may adjust in one suit the rights of all the parties. In different forms this is in substance the doctrine of the cases. The right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. The mortgagee's relief depends upon no original equity residing in himself, but upon the right of the mortgagor against his grantee, *to which the mortgagee succeeds*. Then he is allowed in equity to recover a deficiency of the grantee by a mere rule of procedure, going directly as a creditor against the grantee, in order to avoid circuity of action, and save the mortgagor, as an intermediate party, from being harassed for the

payment of the debt, and then driven to seek relief over against his grantee, upon whom the liability would ultimately fall.

"To support an action upon this ground, therefore, it is necessary in the first place that the grantor, in whose favor the stipulation is made, should himself be personally liable for the debt assumed by the grantee; and in the second place, that there be a debt, or some obligation, on the part of the person assuming the payment of the mortgage, to support his undertaking. If the grantor be not the mortgagor himself, or one who has bound himself personally for the payment of the mortgage debt, the grantee, in assuming the payment of the mortgage does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him. There is in such case no chance for any equitable subrogation, and the agreement is considered as a mere declaration that the property was conveyed to the purchaser subject to the lien of the mortgage.

"*Under this view, a mortgagee's right under a purchaser's agreement to assume the mortgage is an equitable right, and can be enforced only by equitable suit.* Where foreclosure is affected by suit in equity this right is usually enforced by making the purchaser a party to the bill, and asking for a personal decree for deficiency against him."

Jones on Mortgages, (3d Ed.) Sect. 755.

In some of the cases cited in the long list above, as in *Burr* vs. *Beers*, 24 N. Y., 178, *Lawrence* vs. *Fox*, 20 N. Y., 268, and *Garnsey* vs. *Rogers*, 47 N. Y., 233, the liability of the purchaser is placed upon the principle, *that if one person makes a promise to another for the benefit of a third person, that third person may maintai an action on the promise.* (*Burr* vs. *Beers.*) According to this view, the liability of the grantee who assumes the payment of outstand-

ing mortgage, does not depend upon any equitable doctrine concerning subrogation, *it arises out of a contract;* the mortgagee instead of enforcing the liability by a suit in equity may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.

Yet it will be found that most of the cases which place the liability of the purchaser *on the ground of contract*, recognize to the fullest extent the equitable doctrines laid down in *Halsey* vs. *Reed*, *King* vs. *Whitely* and kindred cases.

This idea of *contract* was first distinctly formulated in New York, in *Lawrence* vs. *Fox*, 20 N. Y., 268, (although Judge Comstock rendered a strong dissenting opinion,) and it was afterwards followed in *Burr* vs. *Beers* and other New York cases, yet the doctrine of *Lawrence* vs. *Fox*, *even in New York*, does not at all affect or interfere with the inherent and time-honored *equity jurisdiction* declared in the other cases cited, and which is so forcibly summed up by Mr. Jones. (*Supra.*)

In the late case of *Pardee* vs. *Treat*, 82, N. Y., decided in the Court of Appeals in 1880, *Andrews*, J., delivering the unanimous opinion of the court, says :

"*Independently of Lawrence* vs. *Fox*, the covenant of a grantee in an absolute deed, who, as part of the consideration, assumes and agrees to pay encumbrances on the land, for the payment of which the grantor is personally bound, may be enforced by the creditor *in an equitable action upon the doctrine of equitable subrogation.* (Halsey *vs.* Read, 9 Paige, 446 ; King *vs.* Whitely, 10 Paige, 365 ; Garnsey *vs.* Rogers, 47 N. Y., 233.)"

So that in New York, even if an *action at law* can be maintained to enforce the purchaser's liability *on the ground of contract*, yet equity would still have a *concurrent jurisdiction; that jurisdiction would not ousted.*

But Mr. Jones maintains, in the third and last edition of his work on mortgages, that the doctrine that the mortgagee may directly enforce a purchaser's agreement, *is solely a doctrine in equity and not at law.* He says: "The general rule remains unchanged, that *at law* a promise by a third person to pay the debt of another cannot be enforced directly by the creditor. The promise is primarily for the benefit of the original debtor, and to relieve him from liability for it; there being no novation, he has a right of action against the promisor for his own indemnity, and he alone has such right of action. If the original creditor can sue also, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. *This rule was affirmed in a late case before the Supreme Court of the United States. The original creditor cannot sue at law upon the undertaking of a third person to pay an existing debt.*"

Jones on Mort., (3d Ed.) Sect., 761 *a.*

In support of this position, Mr. Jones cites:

Second Nat'l Bank vs. *Grand Lodge*, 98 U. S., 123:
Mellen vs. *Whipple*, 1 Gray, 317;
Exchange Bank vs. *Rice*, 107 Mass., 37;
Prentice vs. *Brimhall*, 123 Mass., 291;
Coffin vs. *Adams*, 131 Mass., 133, (1881);
Crowell vs. *Currier*, 27 N. J., Eq., 152;

Crowell vs. *Hospital of St. Barnabas*, 27 N. J. Eq., 650;

Booth vs. *Conn. Mut. L. Ins. Co.*, 43 Mich., 299.

In some of the cases cited in the long list heretofore given, the right of action of the mortgagee directly against the purchaser is based upon the equitable doctrine of trusts. The purchaser is assumed to have retained from the consideration a sum sufficient to pay the mortgage, and the sum so retained constitutes a fund in his hands held *in trust* for the benefit of the mortgagee.

Some of the cases in the long list were decided in States where there is only one form of civil action, the distinction between actions at law and suits in equity, and the forms of those actions and suits, having been abolished, so it is sometimes difficult to determine whether they were decided on legal or equitable principles. The two systems are blended together; and either legal or equitable rights are enforced as occassion may demand. Mr. Jones says that "in such States where the holder of the mortgage is allowed to enforce a purchaser's agreement of assumption, *the remedy is really given upon the equity side of the court*," citing *Miller* vs. *Billingsby*, 41 Ind., 489. Jones on Mort. (3d Ed.) Sect. 761 *a*.

In Maryland, and in the District of Columbia, which has succeeded to its systems of jurisprudence, the distinctment between common law and equity, as known to the English law, has been constantly preserved. (*Lessee of Smith* vs. *McCann*, 24 How., 398.)

We will endeavor to show, under the next point,

(III) that the remedy of the complainant, in the case at bar, is in equity, *and not at law*; and that Thompson, the grantor, though he would have been a proper party defendant, yet he was not a *necessary party* to the bill; that neither Ashford's rights nor those of Thompson are at all affected because Thompson was not made a party; and that Ashford, not having taken advantage of the non-joinder by demurrer, plea or answer *cannot avail himself of it at the hearing.*

POINT THREE.

A suit in equity by Miss Keller, the holder of the note secured by the second deed of trust on lot five directly against Ashford, to recover the amount of the note, with interest, was the proper form of remedy; and it was not necessary to make Thompson, the grantor of Ashford, a party defendant to the bill,. Miss Keller had no remedy at law against Ashford.

I.

Lot five, upon which Miss Keller's note was secured, having been sold, before her suit was commenced, under the first mortgage upon it for a sum insufficient to pay the first mortgage, thereby extinguishing her lien, her suit against Ashford was *virtually* a suit to hold him personally liable for a deficiency after foreclosure and sale.

On the 14th of March, 1878, and before this suit was commenced, lot five was sold under the first deed of trust upon it for $1,700, a sum which was insufficient to satisfy and liquidate the debt secured by

said first deed of trust, by reason whereof the lien of the complainant for the amount of the $2,000 note, with interest thereon, became wholly *extinct*, a deed having passed from the trustee under the first deed of trust to the purchaser at the sale. (R., 2, 11, 12.)

Under these circumstances, of course *no bill of foreclosure* could have been filed by the complainant against Thompson and Ashford, or Ashford alone, praying that the property be sold, and that Ashford be held personally liable for any deficiency that might arise upon the sale. Yet lot five having been sold under the first mortgage and not having brought enough to satisfy the first mortgage, the suit afterwards brought by the complainant was, *in effect, a suit to hold Ashford personally liable for a deficiency as though a regular foreclosure suit had been commenced praying for such relief against him.*

It would be monstrous to contend that Miss Keller's rights against Ashford were extinguished, and Ashford's personal liability removed simply because the holder of the first mortgage chose to sell lot five under his power of sale, thereby cancelling Miss Keller's lien on the lot.

In *Norwood* vs. *Hart*, 30 N. J., 412, the land had been sold under a decree, and, upon the sale *it did not bring enough to satisfy all the mortgages upon it.* Afterwards *another suit* was commenced against the parties who had assumed payment of the mortgage debts, *to hold them personally liable.* This last suit was entertained by the court.

II.

Thompson was not a necessary party defendant to

the bill filed by Miss Keller. No objection to the non-joinder was taken by demurrer, plea, or answer.

The precise point was decided in *Miller* vs. *Thompson*, 34 Mich., 10. The bill in that case was filed to foreclose a mortgage given by one Macklin upon lands subsequently sold by him to the defendant Thompson. The deed to Thompson contained a clause that the grantee assumes and agrees to pay the mortgage. The bill was brought by the mortgagee (Miller) *against Thompson alone*, and prayed for a personal decree against Thompson for the amount found due. *In the argument* the defendant, Thompson, relied upon the point that the bill was fatally defective, *because the mortgagor (Macklin) had not been made a party.*

COOLEY, *C. J.*, rendering the unanimous opinion of the court, says:

"It would have been very proper to make Macklin (the mortgagor) a party defendant, *but it was not absolutely necessary.* No relief was sought against him, nor could any decree be rendered that would injuriously affect his interests. It is true that he might have deductions or claims that he would be entitled to have allowed to him if he were proceeded against on the mortgage debt, but he certainly cannot complain if Miller collects of his vendee the sum that, in the sale, he has directed the latter to pay over to Miller. If this overpays Miller, Macklin may call him to account; *but the decree in this case will protect Thompson*, and that is all he can insist upon. *It is to be observed, also, that the objection for want of parties was not taken by any pleading, but for the first time at the hearing.* At this stage of the case any defect that does not preclude a decree that does justice as between the parties and fully determines the controversy as between them, should be overlooked. *Payne* vs. *Avery*, 21 Mich., 524.

But if the objection had been taken by pleading, it would not have been available. *Swift* vs. *Edson*, 5 Conn., 531 ; *Shaw* vs. *Hoadley*, 8 Blackf,, 165."

Judge Story says :

"But we are not to understand from this that the non-joinder of proper parties can be made an objection *in all stages of the cause with equal effect.* The mere non joinder of a party, who might be a proper party, but whose absence produces no prejudice to the rights of the parties before the court, will constitute no fatal objection *at the hearing*, for at the hearing if a decree can be made without prejudice to the rights of the parties before the court, the objection will not avail."

Story's Eq., Pl., Sect. 74 *a*.
Whiting vs. *Bank of U. S.*, 13 Pet., 6.

Judge Story further says :

"It is not safe, in any case to rely upon the mere non-joinder of parties *as an objection at the hearing*. If the court can make a decree at the hearing which will do entire justice *to all the parties*, and not prejudice their rights, notwithstanding the non-joinder it will not allow the objection to prevail."

Story's Eq. Pl., Sects. 237, 542.

See Rule 53 of the Sup. Ct. U. S. practice in Equity cases.

Thompson was willing that Ashford should be sued for the debt due to Miss Keller.

On the 13th of November, 1877, (and before this suit was commenced,) Miss Keller commenced an action at law against Thompson and Kelly, maker and endorser of the note held by her, and recovered a judgment against them, on which judgment execution was issued and returned *nulla bona*, April 15, 1878. (R., 14, 48, 29.) Thompson testifies that Mr.

Boarman, the counsel for Miss Keller, approached him about having him enter a suit against Ashford, and Thompson told Boarman, that if there was any way *in which he could relieve himself from the judgment against him he would willingly do so.* (R., 21, 22.)

III.

Miss Keller could not maintain an *action at law* against Ashford; her remedy was solely *in equity.*

In *Crowell* vs. *Currier*, 27 N. J. Eq., 152, decided in 1876, Vice-Chancellor Van Fleet, says:

"The right of a mortgagee to hold the purchaser of the equity of redemption for deficiency, who assumed the payment of his mortgage by covenant to the mortgagor does not rest on the theory of a contract between the purchaser and mortgagee upon which an *action at law* may be maintained, but stands exclusively, according to an almost unbroken line of adjudications on the ground that the covenant of the purchaser is a collateral security obtained by the mortgagor, which, by equitable subrogation, enures to the benefit of the mortgagee. *The remedy of the mortgagee is purely equitable.*

"*He has no remedy at law.* This point was expressly ruled in *Klapworth* vs. *Dressler*. *Burr* vs. *Beers*, 24 N. Y., 178, declares a different rule. It was there held a mortgagee may maintain an action at law, before foreclosure on the covenant made to the mortgagor by the purchaser of the equity of redemption to pay his mortgage. In the language of DENIO J. the judgment of the court was put distinctly "upon the broad principle, that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on it." This principle, in its application to simple contracts, has given rise to a great contra-

riety of judicial opinion. So far as it applies to simple contracts it must be regarded as settled in this State for the present. *Joslin* vs. *N. J. Car Spring Co.*, 7 Vroom, 146. But it has not been understood to apply to contracts *under seal*, and *Burr* vs. *Beers* is, so far as I know, the first attempt in that direction. The rule that an *action at law* for breach of contract *under seal* can only be brought in the name of a party to the instrument, and that a third person, who is not a party to it, cannot sue on it, though it appeared to have been made expressly for his advantage is so ancient, and has been so generally adhered to, that it must be regarded as axiomatic, and beyond the power of the courts to alter or destroy. The legal nature of contracts of assumption, when expressed in deeds, is no longer open to dispute in this State. *They have been declared to be valid covenants for which of which an action of covenant may be maintained. Finley* vs. *Smithson*, 2 Zab. 311. So completely is the assumption of the purchaser regarded as a contract with the grantor alone, that unless the grantor is personally liable for the mortgage debt, the promise of the purchaser is held to be *nudum pactum* and of course of no efficacy in favor of either the grantor or mortgagee.

"It would seem to be clear, then, that in ordinary cases the mortgagee does not *by force of the contract*, acquire a right of action against the purchaser, *but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor*. He stands in his debtor's rights, and may appropriate, to the satisfaction of his mortgage, *any security held by his debtor for its payment*; he can, therefore, only have a personal judgment against the purchaser for his debt when the mortgagor holds an obligation which will support such judgment. His right is simply the right of substitution, permitting a new creditor to take the place of the old one, and allowing the new to succeed to the rights of the old."

In *Crowell* vs. *Hospital of St. Barnabas*, 27 N. J. Eq., 650, decided in 1876, in the Court of Errors and Appeals, *Depue, J.* delivering the unanimous opinion of the court, says:

"The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, *does not rest upon any contract of the grantee with him, or with the mortgagee for his benefit.*

"The purchaser of lands subject to a mortgage, who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety.

"*In equity*, a creditor may have all the benefit of all collateral obligations for the payment of the debt, which a person standing in a situation of a surety for others, holds for his indeminity. *Maure* vs. *Harrison*, 1 Eq., Cas. Abr., 93; *Moses* vs. *Miergatroyd*, 1 Johns. Ch., 119; *Phillips* vs. *Thompson*, 2 Id., 418: *Pratt* vs. *Adams*, 7 Paige, 615: *New London Bank* vs. *Lee*, 11 Conn., 112. It is the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors."

Now it will be perceived that the New Jersey cases repudiate the idea of a *legal* right in the mortgagee, *arising from contract*, and place his right to sue the purchaser *solely in equity*. But under the New Jersey law a deed *inter partes*, whereby as estate is conveyed, *if accepted by the grantee, although signid only by the grantor, is in law the deed of both parties*. It is the grantee's covenant. (*Finley* vs. *Simpson*, 2 Zab., 311.)

So the New Jersey decisions simply hold, and they go no further, that if one person makes a promise

under seal to another for the benefit of a third person, that third person cannot maintain an action *at law on* it. (*Crowell* vs. *Currier*, *supra.*)

As the deed from Thompson to Ashford *was not signed and sealed by Ashford*, it may be that the acceptance of it by Ashford did not create any *covenant* on his part, notwithstanding the decisions of New Jersey, New York and other States to the contrary (54 N. Y., 35; 5 N. J. L., 311; 48 N. H., 475.) The weight of authority possibly is that a deed, whether in form of indenture or deed poll, is only the deed of him who signs and seals it, while it is the *simple contract*, express or implied, of him who neither signs nor seals, *but only accepts it.*

Regarding then the acceptance of the deed by Ashford as creating merely *a simple contract* on his part between him and his grantor to pay the encumbrances resting on the land, we propose to show that Miss Keller had no right of action *at law* against Ashford by virtue of this contract, but only a right *in equity.* For this purpose we leave New Jersey, and, invading Massachusetts, invoke the latest and highest expressions of judicial opinion in that noble Commonwealth.

In *Mellen* vs. *Whipple*, 1 Gray, 317, it is held that on a promise made to the vendor by the purchaser of an equity of redemption, to assume and cancel the mortgage on the premises, with the note for which it was given, *no action at law* lies by the mortgagee.

In *Exchange Bank of St. Louis* vs. *Rice*, 107 Mass., 37, the court say:

"The general rule of law is, that a person who is not a party to a simple contract, and from whom no

consideration moves, cannot sue on the contract, and, consequently, that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth have tended to uphold the rule and limit the exceptions to it."

In *Prentice* vs. *Brimhall*, 123 Mass., 291, decided in 1877, it is held that on a promise made to the vendor by the purchaser of an equity of redemption, to assume and pay, as part of the consideration named in the deed, the mortgage on the land, *no action at law* lies by the mortgagee.

GRAY, *C, J.*, says:

"The defendant, by accepting the ~~debt~~ deed, made a contract with his grantor to pay the amount of the mortgages upon the land granted, but the grantor transferred no money or fund to the defendant; and the defendant made no contract with the mortgagees, or their assigns, *upon which an action at law will lie. Mellen* vs. *Whipple*, 1 Gray; *Exchange Bank* vs. *Rice*, 107 Mass.; *Pettee* vs. *Peppard*, 120 Mass., 522."

In *Coffin* vs. *Adams*, 131 Mass., 133, decided in 1881, it is held that a mortgagor of land, who has consented, without consideration, that the mortgagee might bring an action at law in his name against a person who, by the terms of a deed poll to him from the mortgagor, has promised to pay the mortgage, may withdraw his consent and have the action dismissed on payment of costs to the mortgagee to the time of such withdrawal.

The opinion in the case was delivered by GRAY, C. J. We desire to call attention especially to the cases cited in the opinion, as some of them play

an important part in this legal drama. The court say:

"It is not doubted that in this Commonwealth *an action at law upon a stipulation in a deed poll*, by which the grantee assumes and agrees to pay as his own debt a previous debt of the grantor, secured by mortgage of the granted premises, *can be bought in the name of the grantor only*. *Mellen* vs. *Whipple*, 1 Gray, 317; *Prentice* vs. *Brimhall*, 123 Mass., 291; *Nat'l Bank* vs. *Grand Lodge*, 98 U. S., 123; *U. S. Mortgage Co.* vs. *Hill*, C. Ct. U. S. Dist. Mass., May term, 1879.

"There are indeed authorities, cited by the learned counsel for the mortgagee, which sustain the right of a mortgagee, upon a bill in equity for foreclosure, to which the mortgagor and his grantee are both made parties defendant, to obtain the benefit of the liability of the latter on his promise to the grantor. *Halsey* vs. *Reed*, 9 Paige, 446; *Klapworth* vs. *Dressler*, 2 Beasley, 62; *Crawford* vs. *Edwards*, 33 Mich., 354; *Corbitt* vs. *Waterman*, 11 Iowa, 86. But the ground upon which these cases proceed is that, in equity the mortgagee, as against his mortgagor, has the right to the benefit of any collateral security held by the latter for the payment of his debt to the mortgagee, and that a court of equity, having the mortgagee, the mortgagor and the grantor before it can adjust in one suit all the rights of the parties. However this may be, they give no countenance to the theory that the mortgagee has the exclusive right, in law or equity, without bringing a suit for foreclosure, to maintain an action at law against the grantee *in the name of the mortgagor without his consent*; or that *a court of law*, where both the mortgagor and the mortgagee are interested in the cause of action, can, upon summary motion, and without regular issues, determine the equities between them, and take the control of the action out of the hands of the plaintiff of record. *Crowell* vs. *Currier*, 12 C. E. Green, 152, (27 N. J. Eq.; *Crowell* vs. *Hospital of Saint Barna-*

bas, 27 N. J. Eq.,) 650; *Corbitt* vs. *Waterman*, 11 Iowa, 86; *In re Empress Engineering Co.*, 16 Ch. D., 125, 129."

In *National Bank* vs. *Grand Lodge*, 98 U. S., 123, the court say:

"We do not propose to enter at large upon the consideration of the inquiry how far *privity of contract* between a plaintiff and defendant is necessary to the maintenance of *an action of assumpsit*. The subject has been much debated, and the decisions are not reconcilable. No doubt, the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which, in equity, belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, *and therefore the rule is that the original creditor cannot sue*. His case is *not* an exception from the general rule that privity of contract is required."

It thus appears by the decisions of Massachusetts and other States, *as well as by the decision of this*

tribunal, that no action at law lies in favor of Miss Keller against Ashford on the assumption clause in the deed. That she has a remedy *in some form* is a doctrine supported by all the leading benches of the country. Where, then, is that remedy to be found? Just where she has sought it—*in a court of equity.*

It is constantly to be borne in mind that lot five, having been sold by the trustee Rohrer, under the first deed of trust for a sum which was insufficient to satisfy that trust, thereby extinguishing Miss Keller's lien on the lot, (R. 1, 2, 11, 12), her suit *brought, subsequently to the sale,* was, *in effect,* a suit against Ashford on the assumption clause in the deed for a deficiency after a foreclosure and sale of the mortgaged premises.

POINT FOUR.

The amount in dispute is large enough to give this Court jurisdiction of the cause.

The act of Congress of February 25, 1879, Sect. 4, (20 Stat. at L., 320,) provides that where the matter in dispute, exclusive of costs, exceeds the value of $2,500, the decree of the Supreme Court of the District of Columbia may be examined, and reversed or affirmed, in the Supreme Court of the United States. (Sup. to Rev. S., Vol. 1, p. 419.)

The decree of the Special Term dismissing the bill was rendered May 9, 1882. (R., 63, 64.) At that date the amount of the note, together with the interest thereon at 8 per cent. per annum, amounted to over $3,000. The decree of the General Term was rendered February 16, 1885. (R., 70.) When it was rendered, the amount due on the note with interest,

amounted to over $3,400. The prayer of the bill demands payment of the amount of the note, ($2,000), together with the interest thereon according to its tenor, that is, with interest from February 21, 1876, at 8 per cent. per annum until paid. (R., 2, 8.) The appeal to this Court was taken and allowed February 16, 1885. (R., 70.)

The sum in dispute at the time of the making of the decree below determines the jurisdiction in error.

United States Bank vs. *Daniel*, 12 Pet., 32.
Knapp vs. *Banks*, 2 How., 73.
The Patapsco, 12 Wall., 451.

Interest accrued after the institution of a suit and before judgment may accordingly be included.

United States Bank vs. *Daniel*, 12 Pet., 32.
The Patapsco, 12 Wall., 451.

"If a party brings a bill in equity, claiming a decree for a sum certain, with interest, and the bill is dismissed, it would seem he can only add the interest up to the time of dismissal to make up the jurisdictional sum.',

Phillips U. S. Sup. Ct. Pr., (5th Ed.,) p. 100.

The decree of the court below should be reversed with costs, and directions given that a decree be entered in favor of the appellant and against the appellee pursuant to the prayer of the bill.

WALTER D. DAVIDGE,
WM. W. BOARMAN,
Sol'rs for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1888.

HENRIETTA C. KELLER,
Appellant,

vs.

ISABELLA W. ASHFORD, Executrix of FRANCIS A. ASHFORD, deceased, *Appellee.*

No. 19.

Supplemental Brief for Appellant.

Briefs both for appellant and appellee were filed in this cause at the last term.

A few days ago there was served on us a second brief of the appellee, purporting to be a reply to the argument on the facts contained in appellant's brief.

We do not propose to answer this paper further than to say, that we believe the record fully supports *every statement* of the facts and the evidence contained in our brief filed at the last term.

The main question of fact, in the case, is, did Francis A. Ashford, the defendant below, *accept* the deed from Thompson and wife to him, dated Jan-

uary 1, 1877, and recorded January 22, 1877. (R., 8, 9.)

We hold that the knowledge communicated to Ashford in February, 1877, that the four houses and lots in question had been "*deeded*" to him, *which deed was then on record*, coupled with the fact that he at once entered into possession of the property, collected the rents, made leases, paid taxes on all the property, and the interest on one of the encumbrances, and conveyed by deed in fee simple one-half of the property to a stranger for $3,000, the purchaser taking subject to existing encumbrances, estop him from denying that he accepted the deed, or had notice of its contents, and it is wholly immaterial whether he actually saw the deed, or knew of its contents, or was aware that it contained a clause that the grantee was personally liable for the encumbrances. *These acts alone constituted an acceptance of the deed.*

But we unhesitatingly affirm that no unbiased mind can read and analyze the testimony set forth in the record, with its tell-tale exhibits, without being convinced *beyond a shadow of doubt* that *certainly as early as September*, 1877, Ashford had full knowledge and notice that the deed was made to him by Thompson and wife, and that it contained a clause that the payment of the encumbrances resting on the property conveyed was assumed by the grantee; yet, in the face of this knowledge, he collected the rents of the property for six months afterwards, *and actually sold one-half the property two or three months afterwards.*

Ashford says he collected rent *after he learned that the property had been conveyed to him by Thompson*, (R. 41,) and he admits that *he collected rents from the property conveyed after he learned of the provision in the deed holding him liable for the encumbrances.* (R., 37.)

If he collected rent even for a single day with this knowledge, *this act alone was an acceptance of the deed.*

Objection has been made that we did not put in evidence the *original* deed from Thompson and wife to Ashford. How could we? After its execution, the deed was delivered by Thompson to Moses Kelly, *the father-in-law* of Ashford (R., 22), and it was recorded January 22, 1877. (R., 8.) There is a memorandum written on the margin, opposite the record of the deed in the Recorder's Office, to the effect *that the deed was delivered to the grantee February* 19, 1877. (R., 30, 31.) We do not regard this entry on the margin as conclusive evidence that the deed was taken out of the Recorder's office by Ashford, as Kelly, or his agent, might have taken it out by presenting the Recorder's receipt, but in view of the facts stated in our brief on file, we claim that the memorandum is a *pregnant circumstance*, and should have much weight. There is no question but that either Kelly or Ashford had possession of the deed after it was recorded, yet they failed to produce it upon notice, but Kelly, in response to the notice, while the testimony was in progress, brought in a deed *which had not been called for.* (R., 48.) While the testimony was in progress *notice was given both to Ashford and Kelly to produce the deed before the Examiner*, but it was not produced (R., 30).

There was, then, nothing left for us to do but to put in evidence a copy, which is admitted to be a true copy of the record, and certified to be such by the Recorder. (R., 24.)

But, fortunately, under the laws of the District, a certified copy of a deed is evidence as the original. And Thompson testifies that when he made the deed *the grantee was to assume the encumbrances upon the property conveyed*, and he was to be relieved from all liability (R., 20); he was to be relieved from all liability for the encumbrances then existing on the lots, *and the notes he had given*, secured by deeds of trust on them. (R., 20.) Upon these terms they were "*deeded.*" (R., 20.) So, the retention of the deed by those whose duty it was to produce it, has not prejudiced our case.

The pretension that Ashford accepted the property with the understanding between him and Kelly that it was to be held simply as a *security* for a pre-existing debt due from Kelly to Ashford, is not at all borne out by the facts. Indeed, the theory seems to have been an afterthought of counsel. We refer to our brief on file (p. 27–31) for a full answer to this theory.

A deed was made by Thompson to Ashford for property worth at least $13,600, and *under the deed* Ashford took possession and exercised a sweeping dominion over the property, even to the extent of conveying one-half of it in fee simple to a stranger. If this sum of $13,600 had been paid to Thompson *he would have had the means* to pay off the encumbrances, including the note held by Miss Keller, the appellant, and have had over $4,100, the value of the

equity of redemption. But, by the terms of the deed, the grantee assumed the payment of the encumbrances, and Thompson, in fact, was never paid anything by any one for his deed. Without this money he was insolvent. Is it, then, anything more than just and equitable that Ashford should be compelled to pay Miss Keller the debt he has assumed?

W. D. DAVIDGE,
WM. W. BOARMAN,
Sol'rs for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 219.

HENRIETTA C. KELLAR, APPELLANT,

vs.

ISABELLA W. ASHFORD, EXECUTRIX, APPELLEE.

Appeal from Supreme Court of the District of Columbia, in Equity.

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION.

A bill in equity was filed in the supreme court of the District of Columbia by the present appellant against Francis A. Ashford, on the 13th day of May, 1878, to obtain the payment of $2,000, with interest at 8 per centum per annum from February 21, 1876. An answer thereto was filed by the respondent, Francis A. Ashford, on the 2d of July, 1878, and a replication to said answer on July 30, 1878. The answer of the respondent denied the claim. The bill was dismissed by the decree of the court in special term and this decree was affirmed by the court in general term, from

which an appeal was taken on February 16, 1885, to this Court. The appellee contends that in such a case where the decree below is one of dismissal the value of the matter in dispute is ascertained by reference to the amount claimed by bill at the time of answer if controverted by such answer. The appellant, in order to support the jurisdiction of this Court, contends that interest alleged to accrue up to the time of the decree of dismissal by the special term can be computed in order to swell the amount controverted by the answer. It is true that this Court, in R. R. Co. *vs.* Trook (100 U. S., p. 112), a District of Columbia case, held that the value of the matter in dispute is determined by the judgment which was affirmed by the general term without adding interest or costs; but that was a judgment in favor of plaintiff for $2,500 by the trial court, which was affirmed by the general term, and the writ of error was dismissed because the judgment of the trial court did not *exceed* $2,500. As by act of Congress judgments bear 6 per cent. interest, this Court did not consider interest accruing from the date of the judgment obtained in the circuit court to the date of the judgment affirming the same in general term, for such interest if considered (and even a day's interest suffices for the purpose) would have made the matter in dispute at the time of judgment by the general term exceed the sum of $2,500. We see no reason why the same principle by which interest accruing after the judgment in the circuit or trial court could not be considered by this Court in determining the amount necessary for its jurisdiction, cannot be invoked by the appellee in this suit, where a decree affirmed by the general term dismisses the bill, leaving the matter in dispute to be the amount claimed by bill and denied by answer. The appellant cites no decision by this Court and no adjudication elsewhere. He does cite a passage in Phillips U. S. Sup. Ct. Pr., 5th Ed., p. 100, where the author states:

"If a party bring a bill in equity claiming a decree for a sum certain, with interest, and the bill is dismissed, *it would*

seem he can only add the interest up to the time of dismissal to make up the jurisdictional sum."

The author cites no authority. Mr. Chief Justice Taney says:

"It is the claim of the libellant and the answer of the respondent denying the claim that make the controversy and ascertain the matter in dispute."

Agnew *vs.* Dorman, Campbell's C. C. Decisions, p. 388.

In an appeal from a decree in equity passed by the circuit court of the District of Columbia, in 1831, dismissing a bill in equity which was filed for the purpose of obtaining a decree for the sale of a lot on which a deed of trust had been given to secure the payment of a sum of money amounting, with interest, to less than $1,000 (the jurisdictional amount at that time), this Court (per Chief Justice Marshall) held that the real matter in controversy is the debt claimed in the bill, and dismissed the appeal. There was in that case an admission of counsel that the debt due *at the time the bill was filed* did not exceed $700, and it was in proof that the land exceeded in value $1,000.

In the present case the debt claimed in the bill did not amount to $2,500 at the time of the filing of the bill and computing interest to the time of answer denying the claim or even to the date of replication to the answer, whereby issue was joined by the parties complainant and defendant, the debt claimed was less than $2,400. A few days after the decree of the general term in this case an act of Congress provided "that no appeal or *writ of error* shall hereafter be *allowed* from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia * * * unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." (Act of March 3, 1885, 23 Stats. at Large, p. 443.) The present appeal was filed herein April 10, 1885. The word "allowed"

in the act of 1885 being applied to writs of error, would seem to mean "entertained." The prior act of February 25, 1879 (20 Stat., p. 320), requiring matter in dispute to exceed $2,500, did not spare cases even docketed in this Court. (98 U. S., p. 398.)

GEO. F. APPLEBY,
CALDERON CARLISLE,
For Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

HENRIETTA C. KELLER, *appellant,*

vs.

ISABELLA W. ASHFORD, *executrix*
Of FRANCIS A. ASHFORD, Deceased.

BRIEF FOR APPELLEE.

GEORGE F. APPLEBY,
CALDERON CARLISLE,
for Appellee.

R. O. Polkinhorn, Printer.

In the Supreme Court of the United States

OCTOBER TERM, 1887.

HENRIETTA C. KELLER, *Appellant*,

vs.

ISABELLA W. ASHFORD, Executrix of FRANCIS A. ASHFORD, *Appellee.*

No. 219.

Brief for Appellee.

This cause comes up by appeal from the Supreme Court of the District of Columbia. The appellant was complainant below, and her bill, originally filed against Francis A. Ashford, was dismissed at Special Term. Pending the appeal to the General Term Dr. Ashford died, the suit was revived against his Executrix, and the decree in Special Term was affirmed by the Court in General Term.

Statement.

By this suit the aid of a court of equity is invoked to the serious injury of an innocent defendant in violation of the maxim *æquitas neminem juvat cum injuria alterius.*

If the complainant have a remedy against the defendant, there seems to be no reason why a law court cannot give her complete and adequate relief, for her grievance is resolved into a pure money de-

mand. She has preferred, however, to ask a court of conscience to obtain for her the payment of a promissory note merged already in a judgment obtained by her against the maker and endorser. The judgment is owned by her and she is seeking its satisfaction from a person who never saw the note nor its maker, who, *ante litem motam*, never heard of its or his existence, who never had any dealings with the complainant, who never received any consideration from her or any other person by reason of the note being made, or to her or to any one else being endorsed or transferred, and on whom as security the complainant never relied nor had the slightest reason for expecting to rely.

The appellant, in February 1876, purchased from Moses Kelly a note for $2,000, made by one Archie Thompson, payable to the order of Kelly, and bearing 8 per cent. interest. This note was secured by a second trust on lot 5 in square 889. (Rec., p. 15) from Archie Thompson and wife to Gordon (Rec., p. 5). The first trust was to secure one Harkness $1,500. (Rec., p. 3). The Appellant seems to have confided in Kelly and to have relied implicitly upon his statement that the note was well secured. (Rec., p. 15).

Dr. Francis A. Ashford had, prior to the year 1877, lent money to a considerable amount to said Moses Kelly, who was his father-in-law, and had endorsed notes for him (Rec., p. 32). In February, 1877, Kelly informed Dr. Ashford that to secure him as much as possible against loss he (Kelly) had deeded to him several houses and lots; that there was an encumbrance on the property but Kelly thought there was "considerable equity" (Rec., p. 32); only one

encumbrance of $1,500 on one of the houses was specifically mentioned by Kelly, viz: the Harkness debt (Rec., p. 32-33), and he stated that the interest was pressing and requested Ashford to pay interest to prevent a sale. Kelly suggested that Ashford had better collect the rents to indemnify himself for the interest he was to pay Harkness. No consideration was mentioned to Ashford except the securing of Kelly's pre-existing indebtedness; no particular sum was agreed to be credited on this indebtedness by reason of the conveyance, only what should be realized was in any event to be credited (Rec., p. 44). The whole purpose of the transaction, as disclosed to Ashford, was to secure him as far as possible against loss by reason of his loans to, and endorsements for, Kelly, but the lots were actually conveyed to Ashford by one Archie Thompson, with whom he had never had any dealings, and whom he had never seen.

Nothing whatever was said about a second mortgage. Dr. Ashford, upon the request of his father-in-law, forthwith paid the interest to Harkness to prevent a sale. This was March 5th, 1877, and for interest up to February 17th, 1877 (Rec. p. 26). This was done to save a sacrifice of the property by public sale. He tells Harkness that so long as he should hold the property, the interest would be paid promptly (Rec. p. 35), and that the taxes would be paid (Rec. p. 36). Mr. Kelly was ill at this time, and offered as soon as he was out again to save the doctor all trouble with the property, (Rec. p. 33). About one month thereafter Dr. Ashford begins to collect the rents (Rec. p. 35), and continues to collect rents owing to Mr. Kelly's continued illness (Rec. p.

35). The rent for house on lot 5, on which Mr. Harkness had his deed of trust was $25 per month, and that was paid regularly (Rec. p. 38), Dr. Ashford pays taxes for several years back, and up to June 30th, 1877, (Rec. p. 36). He pays Harkness $75 on August 17th, 1877, which was interest to that date. Mr. Kelly at this date is still sick, (Rec. p. 35). During the latter part of this month, or at the latest in September, 1877, Dr. Ashford, for the first time, hears of the existence of a second trust on lot 5, suggested (Rec. p. 24-33). He declines to pay interest on the debt secured by it, and states that if such an incumbrance exists he will give up the property (Rec. p. 33).

Between the time of the first mention to Dr. Ashford of the Keller note, and the filing of this bill, there appear to have been various efforts on the part of Miss Keller's Attorney, Mr. Boarman, to obtain from Ashford either an acknowledgment of his liability or a new security for the indebtedness of Miss Keller, but how unsuccessful these were the record will show, and the appreciation of the conflict of testimony on this subject appears in the following:

Opinion of the Court below, by James, J.

(3 Mackey 455)

"The parties to this cause have, we think, substantially agreed upon the law of the case, that is to say on the doctrine that if there was no acceptance of the condition introduced in the deed that Ashford as grantee should pay this debt, he was not bound to pay it, although it was so specified in the deed.

It is not of any particular interest to go into the details of the testimony, but our conclusion after examining it carefully is:

First. That Dr. Ashford was no party at all to the

original negotiation. He had no reason to know and no means of knowing that any such condition was introduced, nor did he even know that a conveyance was made to him by Thompson. Sometime afterward he obtained his information from Moses Kelly, his father-in-law, who was indebted to him, and for whom he was security in some matters.

It should be observed here that the only conflict of testimony is that of Mr. Boarman and Dr. Ashford, and that conflict relates to a matter scarcely material. Dr. Ashford is not contradicted by any body as to the original transaction, nor as to the character of his information from Moses Kelly. That information was to this effect: That Kelly told him he had given him some lots (he was not even then informed where the title came from,) and gave him to understand that he thereby secured him. Kelly did not definitely state that he had given him these lots in payment, and inasmuch as there was no ascertainment between them at that time of the value of the lots, it is not to be presumed that it was in payment of a definite amount; we must therefore, assume from this conversation that Kelly was intending merely to secure a liability. Dr. Ashford paid interest on the incumbrances. It was perfectly natural that he should do just what any person who seeks to save his security must do. He collected the rents. It was consistent with the idea of security that he should do that also. But we do not find any transaction on his part accepting the condition in the deed to pay the debts secured by prior encumbrances.

Just when he obtained his information is not precisely ascertained. We are of opinion, however, that Mr. Boarman is more likely to be mistaken than Dr. Ashford, as to having given him the information in the month of October instead of in the spring of the ensuing year. But, on the whole, that is not material, for we are satisfied that Dr. Ashford did not accept this condition.

The bill does not proceed upon a promise of Dr.

Ashford. For if the plaintiff relies upon a distinct promise, the remedy is an action at law. But the bill is carefully drawn, on the theory that Dr. Ashford has made a contract with Thompson by which he reserved a part of the consideration, and that the amount so reserved constitutes a trust in his hands for the benefit of the plaintiff. But the evidence is that Ashford had no contract whatever as to what the consideration was to be with Thompson.

The fact therefore that there was no understanding as to what the price of the property was to be, supports the theory that it was transferred through Kelley's instrumentality by way of security to Dr. Ashford.

The decree below is affirmed."

On November 13th, 1877, the appellant brings suit at law on the promissory note in question against Archie Thompson, the maker, and Moses Kelly, the endorser, and recovers judgment against both in December, 1877. (R., p. 14-29-48.) Thereafter this bill was filed on the 15th day of May, 1878.

The bill of complaint, though docketed a bill for specific performance, does not purport to be bottomed on thatbranch of equity jurisdiction, but on the enforcement of a trust. The complainant avers, under oath, that certain property therein described was conveyed to Dr. Ashford on January 1st, 1877, subject to two encumbrances in said bill described, "payment of both of which," to quote the language of the bill, "said defendant, Ashford, assumed, and for that purpose withheld and reserved from the consideration by him paid for said property, so much thereof as was then an equivalent of or was then necessary to cancel and settle the said encumbrances;" and she thereupon charges that the amount of said purchase money so withheld by the

defendant was an appropriation by him of said part of said purchase money to the use of the complainant, and constituted a fund by him held in trust for her benefit, which this court will enforce in her behalf." She exhibits a copy of the deed by which the property was alleged to be conveyed to Dr. Ashford. Upon inspection thereof, it appears that four lots in square 889 were attempted to be conveyed to the defendant, with the clause following in the deed: "Subject, however, to certain encumbrances now resting thereon, payment of which is assumed by said party of the second part;" which clause is interpolated in the middle of the granting part; and it further appears that the party of the first part makes a covenant to warrant and defend the property against the claims of all persons claiming under him, the said party of the first part. The deed does not show what encumbrances were resting on the property, and it would seem, by reason of the said covenant, that the clause in question, if valid for any purpose, would, upon a proper construction of the deed, exclude encumbrances upon the property, if any, put thereupon by the grantor himself. The word "certain" employed in the clause is fitly used, because it does not mean "all," and if it meant "all," would be inconsistent with the covenant; but inasmuch as the word "certain" not meaning "all," is well used, because there were taxes and tax deeds which were encumbrances upon the property not placed there by the grantor, and so without the obligation of the covenant, both may have effect, and all the form and substance of the grantor's deed shall be operative, but may not help the contention of the appellant.

Points.

I.

The copy from the record would be proof if deed was delivered of a conveyance of the lots in question by Archie Thompson to Ashford,—proof of the covenants of Thompson,—but it is proof of nothing else. The assumption clause is urged as either a personal contract or evidence of a personal contract. There is no law requiring such a contract to be recorded, and hence a copy from the record is not evidence; the original has not been produced or proved to have been lost, and if this is offered as proof of such a contract for personal liability, it has been objected to and is not competent evidence.

Judson vs. *Dada*, 79 N. Y., p. 378.

II.

But this deed only speaks for grantor; it purports to be an indenture but is only a deed-poll, and of itself it cannot bind Ashford; indeed, if the contract is this clause in the deed, and not something growing out of transactions between the parties amounting to a contract of which the recital is a mere *mention*, we have an unsigned promise imputed to Ashford to answer for the debts of Archie Thompson. The cases, which seeming similar, hold such a promise by a vendee to a vendor to be without the statute, are all cases where there is a clearly proved transaction between parties in which the vendee for an equivalent makes a vendor's debt his own before he makes any promise as to it.

Browne on Stat. of Frauds, 214–214 *e*.

III.

But suppose the deed in all its parts to be perfectly proved before the court, the warranty clause destroys all the force of the assumption as to complainant, whose lien is not enumerated nor excepted, and is a claim under the grantor; "certain," "not all," "encumbrances" covers taxes, which were claims not under grantor, and there was both a tax sale and an unpaid tax resting on the property. Even a mortgage excepted from covenant against encumbrances, is not excepted from warranty.

Estbrook vs. *Smith*, 6 Gray, 572;
Harlow vs. *Thomas*, 15 Pick., 66;
Maher vs. *Lanfrom*, 86 Ills., pp. 513-523.

Taxes are encumbrances.

Peter vs. *Moler*, 5 Ohio, 271;
Mitchell vs. *Pillsbury*, 5 Wis., 407.

IV.

The complainant is forced, even if the foregoing points be not well taken, to prove actual notice of and assent to this assumption clause by Ashford, and this cannot be inferred or presumed.

There is no proof that the deed was ever delivered to or seen by Ashford.

The recording of it did not amount to a delivery nor did it charge Ashford with notice of the assumption clause.

Bull vs. *Titsworth*, 29 N. J., Eq., 73.
Cordt vs. *Hargrave*, 29 N. J., Eq., p. 446.
Mead vs. *Brun*, 32 N. Y., 277.
Jackson vs. *Phipps*, 12 Johns, 421.
Recording Act D. C., 20 Stat., p. 40.

While assent may be presumed to that which is beneficial, it is never presumed to that which is detrimental.

Higman vs. *Stewart*, 38 Mich., 524.

There must be an intelligent assent to fasten a liability such as this upon a man ; here is none.

The payment of interest is not inconsistent with Ashford's not having assumed the encumbrances.

Elliott vs. *Sackett*, 108 U. S., 132.

Drury vs. *Hayden*, 111 U. S. 223.

The subsequent conveyance to Duncan at Kelly's request, under the circumstances, does not fix this liability.

The collection of rents was in pursuance of an understanding with Kelly and at his request to indemnify Ashford for interest paid out by him, Ashford.

Girard Trust Co. vs. *Stewart*, 86 Penn. St., 89.

There is no act of Ashford inconsistent with his ignorance of the assumption clause up to the early spring of 1878, when Mr. Boarman read it to him. On discovery that a second trust was really existent, he repudiated the whole matter and refused to hold the property and go on paying interest on Harkness' note.

V.

The transaction between Kelly and Ashford was really a mortgage though absolute on its face.

Armand vs. *Grigg*, 29 N. J., 482. Refers to *Garnsey* vs. *Rodgers*, 47 N. Y.

In *Elliott* vs. *Sackett*, the deed was reformed on the ground of mutual mistake.

In 77 N. Y., pp. 226–231, the deed was reformed on account of ignorance of one party and fraud of another.

In *Drury* vs. *Hayden*, suit was by mortgagee and the court denied relief, and reasoned that deed might have been reformed. See, also 87 N. Y., p. 44, 88 N. Y., p. 658.

VI.

This complainant shows no pretense of a right in a Court of Equity. There is nothing whatever in the record to charge the conscience of Ashford. He kept back no purchase-money and assumed no trust.

If he had known all about the Thompson note, and had promised to pay it, the complainant's remedy would have been at law.

Ins. Co. vs. *Bailey*, 13 Wall, pp. 620–621.

If Ashford had made a promise to a third person to pay the debt due Miss Keller on the authority of this Court, she might have maintained assumpsit.

Hendrick vs. *Linsay*, 93 U. S., p. 143;
Lawrence vs. *Fox*, 20 N. Y., 268;
Burr vs. *Beers*, 24 N. Y., 178.

Elliot vs Sackett supra
Shipherd vs May 115 U.S. p. 510

Conclusion.

It is submitted that there is no error in the decree of the court below and that it should be affirmed.

GEORGE F. APPLEBY,
CALDERON CARLISLE,
For Appellee.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

HENRIETTA C. KELLER,
Appellant,

vs.

ISABELLA W. ASHFORD, executrix, *Appellee.*

No. 19.

Reply to the Argument on the facts contained in Appellant's Brief.

GEORGE F. APPLEBY,
CALDERON CARLISLE,
For Appellee.

R. O. Polkinhorn, Printer, Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

HENRIETTA C. KELLER, *Appellant*,

vs.

ISABELLA W. ASHFORD, executrix, *Appellee*.

No. 19.

Reply to the Argument on the facts contained in Appellant's Brief.

Since filing herein our brief, in which we endeavored to confine ourselves to a plain statement of the facts with references to the record at every step, the appellants have filed a brief of 56 pages, nearly half of which is taken up with a discussion of the facts.

This part of the brief is full of reflections upon the deceased defendant, supported by disingenuousness and inaccuracy, and, as a whole, produces an impression which is as utterly unwarranted by the record as it is by the character of our deceased friend and client, Dr. Ashford. We deem it only just therefore to submit for the convenience of the court the following brief of facts :

In the latter part of February, 1877, most probably in the very beginning of March, Dr. Ashford awakes to the fact that certain lots of ground, with the improvements, in the northeastern section of the city of Washington, which he had never achieved by any effort or expenditure on his part, had been thrust upon him by his father-in-law, Moses Kelly, without his knowledge, privity or consent, and for the avowed purpose as expressed to him by Kelly, of securing him, the doctor, against loss for moneys lent theretofore by him to Kelly, and for endorsements of Kelly's notes. (p. 32.) The deed conveying the property to Dr. Ashford was never delivered to him. He never saw it nor a copy of it. He has never seen the record of it, and did not know till a long time after that the deed had been recorded. (pp. 12, 13, 21, 36, and 42, Rec.) The deed bears date January 1st, 1877; was acknowledged January 12th, and recorded January 22d, 1877. (pp. 8 and 9, printed Record.) Dr. Ashford did not know that Archie Thompson was named as grantor of deed till the spring of 1878 (p. 41), and the grantor, Archie Thompson, did not know that Dr. Ashford was grantee. (p. 20.) He thought Moses Kelly's son, Abner B. Kelly, was grantee. (p. 20.) Thompson says that on account of the conveyance he was to have land deeded to him by Moses Kelly's son (p. 22), and to have all his, Thompson's, debts and outstanding notes protected by Moses Kelly. It does not appear what the amount was of Thompson's indebtedness as to the payment of which Kelly was to see. Thompson says all his debts were to be paid—and as a consequence, no matter what they amounted to, Kelly would have to pay them. It does not appear what land Kelly's

son was to convey to Thompson, or whether any land was so conveyed; but Thompson is complainant's witness. It is clear from Thompson's testimony that he dealt with Moses Kelly alone; that Moses Kelly came to him late at night, aroused him from bed, got him and his wife to execute the deed before a notary public whom Kelly had brought with him, and that Thompson thought Abner Kelly was grantee. It is also clear that the name of Abner as grantee does not appear on the record; that the original deed cannot be obtained; that the name of Ashford as grantee does appear on the record, and that the deed was delivered to Moses Kelly by Thompson at the time of execution.

It does not appear by the record what arrangements Moses Kelly had with Archie Thompson, who was a carpenter and builder, for building the houses on the lots conveyed, nor does it appear wherefore Kelly was enabled to exercise such a complete dominion over the property carried in Thompson's name. He had, however, used the same property just as arbitrarily when he (Kelly) attempted to secure the complainant the payment of her $2,000, by obtaining from Thompson a deed of trust for the payment thereof, for Thompson cannot state whether or not he got any of the cash from the note given for the said $2,000. (p. 21.)

It does not appear by the record what induced Kelly to get this property out of Thompson's control, where it was shielded against his creditors (for he was embarrassed and had failed pp. 13 and 40 printed record), and to mortgage it to Ashford in the form of an absolute conveyance, when Ashford was not asking for security nor aware of his inten-

tions. It might be that, broken in fortune and in health, he thought he had reasons to fear Thompson's fidelity to the arrangements between them, whatever they were. Whatever his motive might have been, it is clear that Dr. Ashford knew of the transaction only through Mr. Kelly, and that Mr. Kelly told him that he had the property deeded to him because he wished to protect him as much as possible against loss; that Dr. Ashford did not request the conveyance, and was informed by Kelly that there was an encumbrance upon the lots, but that he, Kelly, thought "there was considerable equity;" that on one house and lot there was a deed of trust to Harkness for $1,500, and that the interest was pressing, and he requested him to pay interest to prevent sale. The doctor told him that his professional duties prevented him from looking after the property; but Mr. Kelly, who was sick in bed, said when he got well he would relieve him of any further trouble. He stated also that he, the doctor, had better go on and collect the rents from the property, so as to indemnify him for the interest he was to pay Harkness, then amounting to $150, and also to pay arreages of taxes. Nothing whatever was said about a second mortgage. Dr. Ashford, upon this request of his father-in-law, forthwith pays the interest of Harkness to prevent a sale. This was March 5th, 1877, and for interest up to February 17th, 1877 (p. 26). This is done to save a sacrifice of the property by public sale. He tells Harkness that so long as he should hold the property the interest would be paid promptly (page 35), and that the taxes would be paid (p. 36). About one month thereafter he begins to collect the rents (p. 35). He continues to collect them, owing to Mr.

Kelly's continued illness (p. 35). The rent for house on lot 5, on which Mr. Harkness had his deed of trust, was $25 per month, and that was paid regularly (p. 38). He pays taxes for several years back, and up to June 30, 1877 (p. 36). He pays Harkness $75 on August 17, 1877, which was interest to that date. Mr. Kelly, at this date is still sick (p. 35). During the latter part of this month, or at the latest in September, 1877 (Boarman's testimony, p. 24), Mr. Boarman sees Dr. Ashford on behalf of Miss Keller and informs him of her deed of trust. Mr. Boarman, in his testimony, says: "At the first interview I informed Dr. Ashford that from my examination of the land records of this city, I had discovered a deed conveying said lot to him in fee subject to the incumbrances resting on the same. I also informed him what incumbrances I had found, and that the $2,000 note held by Miss Keller was secured by one thereof." Dr. Ashford testifies that this was the first knowledge he had of a second deed of trust on the property (p. 33), and that he was much surprised to learn that there was such an incumbrance. He stated to Mr. Boarman that there must be a mistake about it, and that he would see Mr. Kelly concerning the matter. Mr. Boarman wished the interest paid. Dr. Ashford declined to pay it, and stated that if such an incumbrance existed, he should decline to accept the property (p. 33.)

At the next interview with Mr. Boarman, he tells him that he was sorry for Miss Keller, that he would convey the property to her so that she would be saved the costs of advertising and sale and so that she could get the benefits of the rent; that he had already paid out in interest and taxes more than he

had received in rents, and that he would advise her to take the property inasmuch as the rents would pay her a very good interest both on the amount she had lent on the property and the amount of Mr. Harkness' mortgage. (p. 33.) He notified Mr. Harkness that he declined to be responsible any longer for interest on said mortgage, inasmuch as he had learned that a second mortgage existed of $2,000, which he regarded as making the property valueless to him ; that he declined being responsible and that he could sell the property to secure himself whenever he felt justified, believing that without such a notice Mr. Harkness would rely on him to pay the regular installments of interest as he had been doing. (p. 34.) Up to the time of Mr. Boarman's first interview with Dr. Ashford it is clear that Dr. Ashford had no knowledge of a second deed of trust. It seems, not only from Dr. Ashford's testimony, but from a letter afterwards written by Boarman but never sent, (p. 46), that payment of the principal of Miss Keller's note by Dr. Ashford was not at first required. The payment of interest would have sufficed. And Mr. Boarman says that the question of Dr. Ashford's liability or accountability was not discussed at the first interview. (p. 26.)

The whole conduct of Dr. Ashford and all the circumstances go to show, as will appear *infra*, that the question of his liability was not discussed till the following spring, when he was first made acquainted with that clause in the deed to him by which payment of certain incumbrances, not specifying any, is assumed by the grantee. It was natural for Mr. Boarman to go to one in whom the equity was vested, to see if interest would be paid on his

note though overdue, when a note underdue was secured by a prior deed of trust. And when Dr. Ashford said he would decline to pay interest in the event that Mr Boarman's statement, as to a second mortgage, proved to be true, it was, perhaps, thought right by Mr. Boarman, the lawyer, to devise means to obtain some recognition of the second deed of trust. Mr. Boarman accordingly penned a letter dated September 14, 1877, but after writing and press-copying it, he concluded not to send it, and did not send it. He does not remember whether or not he wrote another letter in lieu of it, (p. 47), but Dr. Ashford, who testified prior to the exhibition of the letter of September 14th, says that he is under the impression that Mr. Boarman about that time wrote a note in which it was intimated that drawing the rents from the property, he, the doctor, should secure Miss Keller's note, and the doctor interpreted the note as an endeavor on the lawyer's part to obtain from him, the doctor, a recognition of Miss Keller's trust (p. 36.) This note was probably thrown in the waste basket. The doctor's habit was not to preserve letters or notes after being answered. (p. 44.) Mr. Boarman doubtless perceived that Dr. Ashford could not be inveigled into any promise about the matter, and inasmuch as the doctor had emphatically asserted that he would not accept or be bound by the deed of trust to secure Miss Keller (P. 34), and at the same interview had said he was sorry for Miss Keller, it was natural that Mr. Boarman should then endeavor to have the doctor use his influence with Mr. Kelly to the end that Miss Keller might be secured, and this he did. (p. 43.) The doctor used his influence to that end, but he

expressly says that he did so without at any time expressing an opinion that would indicate that he, the doctor, felt personally bound in the matter (p. 43); and the postal card written to Boarman and produced in evidence on cross-examination of Boarman (p. 29) shows clearly, in the light of the explanation given on pages 39 and 40, that at the date thereof, October 29th, 1877, the doctor declined to make himself personally liable by giving a note of his own secured by certain collateral deed of trust notes offered by Moses Kelly.

Mr. Boarman having failed to obtain from Dr. Ashford a recognition of the trust by the payment of interest and having failed to obtain further security for the note from Mr. Kelly through the influence of Dr. Ashford, two objects which he had in view when he penned the letter of September 14th, might now, one would think, at the beginning of November, 1877, reconsider the contents of the threatening letter of September 14th, and not only write but send to Dr. Ashford a letter citing to him the clause in the deed to him assuming the payment of the incumbrances and calling upon him for payment since he in that September 14th withheld letter, writes to Dr. Ashford: "As to your liability, I think there is no doubt. I have *carefully examined* the law and am more than satisfied that your assuming to pay incumbrances made you liable to pay them." Dr. Ashford, however, swears positively that he was not told of this clause till the spring of 1878 (pp. 36, 37, 62, 63, and 41), and although his testimony is taken nearly four years after the suit is brought, when his memory might be dimmed, yet in his sworn answer, made when the matters were fresh in his recollection,

and filed July 2d, 1878, he says "that he has never seen, read, or heard read the said alleged deed to him, or a copy thereof, nor was he ever aware that said alleged deed contained any clause or provision making him, in express terms or otherwise, assume the encumbrances therein, or requiring him to pay the same, *until a short time since*, when notified that such was the fact" (pp. 12 and 13).

Mr. Boarman did not, however, write another letter, because he was evidently in a quandary, and did not know how to proceed. If Dr. A. should become acquainted with the contents of the deed to him, and with the law applicable thereto, he would be certain to get rid of his alleged liability by conjunction with Moses Kelly and the grantor of the deed. Mr. Boarman, therefore, resolves to sue Archie Thompson and Moses Kelly, and does do so, November 13th, 1877, getting judgment against both in December, 1877. He then tries to get Archie Thompson to sue Dr. Ashford (pp. 21 and 22), and Archie Thompson tells him if there was any way in which he could relieve himself of the judgment against him he would willingly do so. Execution had issued on the judgment. On or about December 4, 1877, Moses Kelly requested Dr. Ashford to convey to Thomas Duncan lots 7 and 8 (p. 40), which the doctor did. Lot 9 was sold under deed of trust by William A. Gordon, in latter part of the same December, to Mrs. Gray. (p. 40.) Dr. Ashford never collected any rent from the house sold to Mrs. Gray. When said judgment was obtained the doctor had only lot 5, and the quarterly interest due November 17th was unpaid, and he had told Hark-

ness that he could sell. He had offered Miss Keller the property, but her attorney had refused to receive it. It had become apparent to Mr. Boarman that Dr. Ashford was willing to do nothing outside of and beyond this offer of the property, and he accordingly makes a demand upon Dr. Ashford for the payment of Miss Keller's note. This demand Dr. Ashford says was made in February, 1878. (R. pp. 11, 42.) It was probably made before the end of March, 1878, because the property was sold March 14th, and Harkness bought it for $1,700. (p. 2.) Boarman in his testimony says that his interviews with Ashford "probably ceased when he peremptorily refused to pay the note in question, which was, perhaps, a month or little more before the filing of the bill in this case. It may have been two months before." (p. 29.) Mr. Davidge was employed April 23, 1878 (p. 48), and the bill was filed May 13, 1878. Two months before would make it March 13, 1878. It is true that (on page 49, printed Record) Mr. Boarman, in his deposition in rebuttal, says, in answer to a question:

"When was it first determined that a suit in equity should be brought by Miss Keller against Dr. Ashford for the purpose of collecting the note held by Miss Keller?"

"A. Not until after Dr. Ashford refused to pay the note, which was in the early part of the fall of 1877."

But in this he is clearly mistaken, because he approached Archie Thompson, about his bringing the suit, after judgment against him in December, 1877, and, of course, Mr. Boarman must have determined

to bring suit in equity for Miss Keller after Thompson's refusal to do so, which was after the judgment against Thompson, which was in the winter. and not in the early fall. He is more correct when he says about two months before the filing of the equity suit. It was about the same time that Dr. Ashford was made acquainted with the fact that the deed contained the clause in controversy. (p. 42.)

The bill of complaint was filed as a result of Dr. Ashford's refusal to pay the note, and a decree to compel the payment is sought to be obtained by the appellant's attorney on his own testimony.

As the appellant did not know of this deed to Dr. Ashford until some time after it was recorded, as Dr. Ashford knew nothing whatever of the transaction, and never heard of the encumbrance, in which appellant was interested, until apprised thereof by her attorney eight or ten months after the date of the deed, and as Archie Thompson, the grantor of the deed to Ashford, the appellant's own witness, has no recollection of signing a deed of trust to secure the appellant's note (p. 19,), it seems strange that the appellant should have sworn that the deed was made by said Archie Thompson, subject to two well-described encumbrances which she describes, one of them being her own and both of them created by the grantor, but excluded by his covenant. The deed itself, which she exhibits, does not justify such careless swearing, and it is obvious that the circumstances, as presented by the testimony, do not give color to her sworn allegation. Although strange that she should have so sworn, it is not incredible, since she states upon her oath that Dr. Ashford actually deducted enough

from the purchase money to pay her debt, and holds the same in trust for her; and this oath is volunteered, the oath not being required to the bill of complaint. After making this oath and receiving defendant's answer, she does not amend her bill, but she allows three years, the period of limitations, to elapse before taking any testimony in the premises, and when she is produced as a witness she is not asked a single question by her attorney respecting such a vital allegation as to which she has already sworn, and which the answer directly puts in issue. No testimony whatever is adduced to show the deduction by Dr. Ashford of any purchase money.

Comments on Mr. Boarman's Testimony.

The memory of the appellant's attorney, according to his own testimony, is very defective, for he testifies (p. 55) that it "is not distinct and clear but nebulous." For example: He does not know whether or not Miss Keller accompanied him when he went out to look at lot 5, square 889, and improvements (p. 30), although it is on "H" street N. E., between Seventh and Eighth streets N. E., (p. 35), nearly two miles from his office, which was then in the Webster Law Building (p. 56), 505 D Street N. W. (page 59), and the purpose of his going was to see what security Miss Keller had. [This is not very flattering to his lady client, Miss Keller. She will be content as we are not to impeach his testimony as to his *mnemonic nebulosity.*] Again: He does not know whether his visit to the northeastern section of the city to view her security was prior or subsequent to his first interview with Dr. Ashford on

the subject of her security (p. 30). Again: He does not know how Dr. Ashford received the news from him that there was a second deed of trust on the property to secure Miss Keller, for he does not remember whether or not Dr. Ashford said anything to lead him (Boarman) to believe that the doctor was or was not ignorant of the said deed of trust (pp. 25–26). Again: When asked (p. 28) "did she (Miss Keller) not inform you first that Dr. Ashford should be held responsible?" He answered, "I don't think she knew of Dr. Ashford's responsibility until I informed her to that effect," whereas Miss Keller in her testimony repeatedly says that Mr. Kelly told her that Dr. Ashford would be responsible; that he so told her before she withdrew the note from bank (page 16), before she retained Mr. Boarman (p. 18). Woman-like, thinking that this statement of Mr. Kelly was of exceeding importance and that it had the efficacy to affect Dr. Ashford with a liability, she testifies as to it and is indeed so anxious to get it into her testimony that she persists in the repetition of it, volunteering it at least three times when not responsive to any question and always in face of the defendant's objection. It seems, therefore, incredible, if it be true that she was told by Mr. Kelly, as alleged, that Dr. Ashford would be responsible, that she should fail to tell her counsel what to her seemed so important. If she did tell Mr. Boarman, it is an unparalleled treachery of memory exhibited by Mr. Boarman. If she did not tell him, Mr. Boarman has in his zeal to be a witness in her case placed his client in the attitude of a falsifier. It is better, therefore, to gloss the discrepancy, as we have here done, by ascribing it to

the attorney's *mnemonic nebulosity*. Again: When asked, "Did you ever approach Archie Thompson and endeavor to get him to bring a suit against Dr. Ashford, &c.?" (page 54). He answers: "I do not remember anything on that subject."

Q. "Can't you remember that something to that effect occurred between you and Thompson?"
A. "I cannot remember anything of the kind. I know I saw him twice or more, but my memory is too *shadowy* to state or say what occurred between us. I do not, however, recollect the subject-matter of your inquiry."

A full days exercise of a "shadowy" memory enabled him to testify rather differently at the next session before the examiner. Archie Thompson the appellant's own witness had testified (pp. 21–22) as follows:

Q. "Did any one ever approach you about having you enter a suit against Dr. Ashford?
A. "Yes."
Q. "Who approached you about this?"
A. "Mr. Boarman, the counsel for the complainant, who is here present."

This testimony was taken on December 16, 1881, and Mr. Boarman's testimony, above cited, was taken February, 17th, 1882, (pp. 49 and 54), or about two months afterwards. Now, an examiner does not take down the interruptions made by counsel. That Mr. Boarman made some remark during the giving of Thompson's testimony is not denied by him, (p. 55), and gives warrant for the following interrogatory put to him by defendant's counsel after his testifying that he was present when Thompson testi-

fied, and heard him testify to the effect as above quoted: "Didn't you at that time state, in the presence of Thompson and of myself, that you did approach Thompson for that purpose, or do you remember about that?" The witness in answering is unwilling to deny that he made such a remark, and is rather certain that he did approach Thompson for that purpose; or, to use his exact language, he is *more certain that he did than that he did not.* This incident gives token of a memory very phenomenal, dark, shadowy, *sed cum lucidis intervallis*, a continued *nebulosity* save when rifted for the nonce, on December 18, 1881, when his own witness, Thompson, was testifying. There are other examples in the record showing that Mr. Boarman truly states that his memory is not clear and distinct, but *nebulous.* A truce, however, to any further examples seems to be here required, and it will suffice to add that Mr. Boarman, in justice to himself, mistrusted his memory whilst under examination as a witness, for, as appears by the record, he testified that "*in order to be precise and accurate,*" he wrote down beforehand some of the testimony which he proposed to give for his client, and referred to the same in the giving of his testimony. (pp. 58 and 59.)

Now, the character of testimony given by a man of such nebulosity of memory is fittingly illustrated by his testimony as given on February 17th, 1882, and as given on February 27th, just ten days after. On February 17th, in answer to the question, "Did you apply to Thompson or to Kelly to have either of them pay the note before bringing the action at law against them?" he says: A. "Very likely I did; my best recollection is that I did. I am *certain* that I

did call on Mr. Kelly." (p. 52.) On February 27th, he says (p. 61): "I am *not certain* that I saw Mr. Kelly before the suit was commenced on the note. I may, however, have done so before commencing the suit against him."

The positive assertions, based upon the memory of such a witness, when contradicted, claim very little, if any, credit, and when contradicted by the positive, direct testimony of a witness who is not afflicted with *mnemonic nebulosity*, are entitled, we submit, to no credit whatever.

The record shows that in many instances Mr. Boarman has not recollected, when he testifies to the alleged occurrences, that in exercising what the metaphysicians call an intentional or voluntary memory, he does not recall, but infers that he must have done what he says he has done, and upon such "reasonings in his heart," he swears, after the lapse of four years, that he has actually done them. For instance, on page 28, printed Record, in answer to the question: "Did you inform Miss Keller, at this interview, that you considered Dr. Ashford responsible for the payment of that note?" he says: "I suppose so; I do not see any reason why I should not so have done." And then in answer to the following question: "What is your recollection on the subject? "he says: "I must have put her in possession of such facts as I had gathered from my examination of the land records. Such is my recollection." Is this recollection? Is it evidence? Again, when asked (see p. 52) whether he saw Thompson after the action at law was brought, he says: "I may have seen him; I think he called to see me, and perhaps at my written request to do so. I think

he came in my office to see me." But when further questioned, he says, he cannot state whether it was after the action was brought; that it may have been before, and more than likely was before; that it was before, because he could have no reason in the wide world to see him after he got judgment against him, for he was then pretty sure of Thompson's inability to pay the note, and his leading reason to see him before the suit was to get the money on the note.

Can such reasoning, or presuming, be taken for recollection, when the testimony of his own witness, Thompson, shows that he came to see him after the judgment. (page 22.)

He answers the same way about the clause in the deed to Ashford, to the purport that the grantee assumes encumbrances. (See p. 47.) He says: "I do not distinctly remember that I did. My impression is, that if I did not write, I saw him (Ashford) in person. In either case the clause in question must have been referred to." This was taken down subject to the objection of defendant, but it reveals the fact that as to this clause in the deed, he had no recollection, but assumed that he must have told Dr. Ashford about it, because he knows, not from recollection, but from an unmailed letter, written, so he says, on September 14th, 1877, that at that date he knew of the clause in question (p. 45), and nursing this assumption for a time, he gradually believes it, and is thereby afterward led to swear positively that he not only told Dr. Ashford of the clause in the deed of Thompson, as first sworn to, but that he showed him the clause written on a piece of paper, and that this was at his first interview (p. 58) with Dr. Ashford.

Of course this testimony is merely inferential and, considering the character of the witness' memory, its nebulosity, the circumstances of time and place have no fixed habitation with him. Dr. Ashford shows place where and time when the clause was shown to him. (p. 62 and 63.)

Sir John Romilly thus speaks of a witness like Mr. Boarman (Pierce *vs.* Brady, 23 Beavan, p. 70):

"In the examination of the evidence of witnesess great difficulties of various sorts arise, and one o fthe difficulties and dangers with which the court has constantly to deal in examining the evidence of witnesses who are perfectly honest and give their evidence perfectly *bona fide*, arises from their turning *inference* into *recollection*. It frequently happens that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur. * * Undoubtedly, in the cases to which I have alluded, I have frequently found that when it was for the interest of the witness, by dwelling long upon the subject, he has come to believe that to have happened which at first he did not remember, that he has turned inference into recollection, and has at last given positive testimony upon which the court could place no reliance, although at the same time, wilful perjury is not attributable to the witness."

The cardinal questions of fact to be settled in this case are:

1. Had Dr. Ashford a trust fund, as by the bill alleged, of which this court will compel distribution?

2. Did he ever intentionally and understandingly promise or agree to pay the note held by complainant?

As to the first question, the answer must be No! because there was not even an attempt by complainant to prove the existence of such a fund, and the whole record negatives any possible presumption that any purchase money was retained.

As to the second question, the necessity of a negative answer is equally imperative.

It may be that Moses Kelly made promises and broke them, but Dr. Ashford when asked on cross-examination: "Q. Did Mr. Kelly act as your agent?" answers "No." (p. 36), and on his direct examination he says that he never authorized any one to accept on his behalf the deed from Thompson to him, and it is certainly established by the record that Dr. Ashford never intentionally assumed the payment of appellant's note, and received no consideration upon which the imposition of such a payment could be based. As soon as he heard of Miss Keller's deed of trust he was willing to convey to her the property, and offered so to do. That this offer was made is not disputed, but it is a matter of dispute as to whether it was made in the beginning when Dr. Ashford first learned of a second deed of trust. Mr. Boarman says it was not made in the earlier interviews (p. 47); Dr. Ashford says it was and repeatedly (p. 42). Mr. Boarman, however, introduces into evidence a letter from Dr. Ashford to him, dated October 3d, 1877, in which he says: "If Miss Keller, for whom I have a very kind feeling, is wise, she will take the house and lot, although it is against my personal interest to so advise. It is fully worth what it will stand her. It is a much better finished house than the others which look so much like it. It would have saved

her much needless expense to have accepted my honest proposition in the beginning, as it would have avoided advertising and commission expenses." (pp. 26 and 27.)

This letter is a corroboration of Dr. Ashford's testimony, for the letter can be construed only in one way, and that is, that in the beginning Dr. Ashford offered to surrender to Miss Keller the property. Dr. Ashford did not intend to keep it. He had notified Mr. Harkness to that effect, so that he could sell upon non-payment of interest. He had paid out on account of taxes and interest, $279, and had received, on October, 3d, 1877, $175 for rent, thus being out of pocket $104, (p. 26), and although it was to his interest to keep the property longer so as to reimburse himself for loss, yet he is anxious, on Miss Keller's account, to surrender the property to her. (pp. 26, 43 and 44.) His non-payment of interest after the knowledge of a second trust, his allowing the property to be sold for $1,700 by public sale, to prevent which induced Kelly to inform Ashford of the deed to him, and to request Ashford to pay interest, his conveying away the other lots to other persons who were losers by Kelly's business transactions (p. 40), without compensation to him, instead of holding them for his own security, and the fact that Mr. Kelly had involved him in greater loss instead of securing him against former losses, for Dr. Ashford says, on page 34, that he lost money on each and every of the houses—are all circumstances going to show that Dr. Ashford, instead of ratifying Mr. Kelly's transactions, did what he could to repudiate them, and that he did and was willing to do, without further and greater sacrifice

to himself, what he could on behalf of others who were losers by Mr. Kelly. The indebtedness on account of which Mr. Kelly had the property conveyed to him has never been paid in whole or in part (p. 44); no particular sum was agreed to be credited on the indebtedness by reason of the conveyance (p. 44); and, inasmuch, as Dr. Ashford was a loser, the awarding of the relief asked by the appellant against Dr. Ashford's widow and four orphans (p. Rec. 68), would not be conscionable, and cannot be countenanced by this court, which will doubtless tell the appellant that if she ever had any remedy in the premises, it was at law, where the relief is plain, adequate and complete.

In the brief for appellee, filed last term, all discussion of Mr. Boarman's testimony was purposely omitted, and the conflict between it and that of Dr. Ashford was left where the very considerate, though accurate, appreciation of it by the Court below had placed it. (Appellee's Brief, p. 4.) But when after such consideration we came to read appellant's brief (pp. 1 to 26) it seemed to us only justice to the memory of our dead friend to turn a full clear light on the *mnemonic nebulosity* of appellant's counsel.

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